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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 5

STATE OF NEW YORK AND SARATOGA SPRINGS COMMISSION AND SARATOGA SPRINGS AUTHORITY,

Petitioners,

v.

UNITED STATES OF AMERICA.

BRIEF FOR THE STATES AS *AMICI CURIAE*

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BRIEF FOR THE STATES AS *AMICI CURIAE*

Statement

The questions propounded by the Court's order on October 8, 1945 in this case are clearly addressed to every State in the Union. They go to the foundation of our entire constitutional system. They involve the continued existence of the States as free and effective instrumentalities of local government.

Under our constitutional system, the guarantee that the States should forever continue to exist is the first premise of American government. Upon the Attorney General of each State falls the sworn duty of defending his State's sovereignty. When the Court propounded its questions on October 8th, the President of the National Association of Attorneys General, John M. Rankin of Iowa, therefore directed the preparation of a preliminary draft of this brief and its submission to the Attorney General of each State for

comment and criticism. The annual meeting of our association on November 27-29, 1945, afforded an opportunity for the submission and consideration of the comments of the individual Attorneys General. By a unanimous vote, the incoming President, Attorney General Greek L. Rice, was vested with full discretion to take appropriate action. Accordingly, the Association, acting through its incoming President, has joined in this brief with the individual Attorneys General whose names are subscribed hereto.

This brief is submitted by the several States pursuant to the permission granted by Rule 27(9) of the Rules of this Court. It is submitted in accordance with the Court's admonition to a claimant of immunity in *Willcuts* v. *Bunn*, 282 U. S. 216, 233 (1931), that "No state has ever appeared at the bar of this court to complain of this federal tax." See also STONE, *J.*, dissenting in *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 582 (1931).

The questions posed by the Court's order of October 8, 1945 are these:

> "1. May Congress constitutionally include for taxation in a generally applicable taxing act any state property or activity or the income derived by the state from them or any other source, so long as the tax does not discriminate against the state, or so long as the tax is not laid on the interest taxed, merely because it is that of a state—and if income of a private person from a like source may be constitutionally taxed?
>
> "2. To what extent may a state, by enlarging its property ownership or its activities, withdraw from the reach of the federal taxing power property and income which are normally subject to federal taxation when owned or received by private persons. See *United States* v. *California*, 297 U. S. 175, 184, 185, and cases cited."

As the Court knows, the Attorneys General filed no brief upon the original argument of this case. We believed

the case fell squarely within the rule of *Brush* v. *Commissioner*, 300 U. S. 352 (1937), and we would not have presumed to burden the Court with arguments addressed to the fundamental constitutional principles involved. This brief is filed solely because of the Court's questions.

While these questions are broad indeed, we necessarily assume that it is the intention of the Court to confine its decision and opinion to the facts of the particular case at the Bar. We assume that far-reaching and fundamental constitutional issues of the breadth encompassed by the Court's questions will not be foreclosed by this Court at this time and in this case.

The States direct this brief solely to the Court's questions. We do not argue the merits of the specific controversy out of which the present case arises. We do not treat at all the extent to which private persons or corporations may enjoy derivative immunity. We consider only the question of direct taxes upon the States themselves and their property, activities or income. In this connection we, of course, mean "the States" to include their political subdivisions.

Our approach is guided by the breadth of the Court's questions. The questions invite not a review of precedents but rather an analysis of the basic policies involved in the field of intergovernmental immunities. They invite a review of our system of government that will be of assistance in adapting the road that has been followed in the past, and upon which the work and achievements of our States and Nation have proceeded, to the democratic problems of the present and of the future.

There is, of course, no conflict concerning the basic rule of state immunity from direct taxation. The Court has stood inflexibly upon this principle through all the ebb and flow of the conflicts on derivative immunity and on the nature of a "governmental function." It is the one rule on

which dissenting justices agree with majority justices, and reversing and overruling opinions agree with reversed and overruled opinions. With all the controversy in this field there has never been the faintest suggestion that the Congress could subject the States to taxation generally, merely because the taxes were non-discriminatory.

So it is not likely that the basic rule of immunity needs clarification, but rather the exception to the rule which has labored to distinguish between "governmental" and "non-governmental" functions. The questions propounded would seem to indicate the Court's dissatisfaction with the delineation of the character of these functions by "the gradual process of historical and judicial 'inclusion and exclusion' "[1]—a dissatisfaction that was foreshadowed by Mr. Justice BLACK in 1938[2] when he wrote critically of attempts to pass judgment upon the character and quality of various state activities, and to categorize them as "governmental" or "non-governmental" in accordance with what he called "individual philosophies" about the proper sphere of state activity.

Point I is addressed to the Court's first question. In it are considered arguments for and against federal power to tax all state property activities and income if the tax be non-discriminatory. We have chosen this approach to the issue as a matter of logical analysis, even though as a practical matter it would involve the complete disruption of practically all of the normal and established functions of state and local government and in many cases their utter bankruptcy. We assume that such a drastic change in our system of government will be approached, if at all, only by the orderly processes of constitutional amendment. If such an overthrow of the normal functioning of state and local government were ever attempted by judicial process, the people would be faced with the immediate necessity of

[1] *Brush* v. *Commissioner*, 300 U. S. 352, 365 (1937).
[2] *Helvering* v. *Gerhardt*, 304 U. S. 405, 424 (1938).

convening a constitutional convention to reconstruct the necessary divisions of general and local government and to repair the collapse of state and municipal finances that would instantly follow in the wake of such a decision. But even though the realities make it inconceivable that the Court would consider turning back the clock of constitutional interpretation through an orbit of one hundred and fifty years, a reappraisal of the unsoundness of such a policy, even as a matter of original consideration, would seem to be helpful.

We do not consider that there is any different limitation on federal taxation of state income than on state property or activities. The Sixteenth Amendment is subject to the same implications to protect the federal system as the rest of the Constitution. We do not discuss in this brief the discredited arguments that the Amendment enlarged the federal power to tax the States. If the Court is interested in our position on that question, the answer is provided in the brief which was submitted in 1939 to the Senate Finance Committee and the House Ways and Means Committee by the Attorneys General of thirty-nine States.[1] An excellent summary was provided in the Senate Subcommittee Report on the subject which was accepted by vote of the Senate, September 19, 1940.[2]

We would not be discharging our full obligation to this Court or to the country if we contented ourselves merely with a negative answer to the Court's first question. The problem of intergovernmental taxation and immunity would still remain for solution. Two approaches are possible in determining to what extent the basic rule of state immunity should be limited by other considerations: (1) the necessities of an effective federal government; or (2) the nature of the state activity.

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[1] Part III of "The Constitutional Immunity of State and Municipal Securities." Copies are on file in the library of this Court.

[2] 76th Cong., 3d Sess., Report No. 2140, Part 2, pp. 33-41.

Accordingly in Point II we shall appraise an interpretation of the Constitution which would permit federal taxation of the States only to the extent that such taxation is proven as a matter of fact to be necessary to the continued existence of the federal government. This is an interpretation of the Constitution which is, not only in accord with basic constitutional theory but is workable and would end the plague of recurring litigations in this Court. Our conclusion is that taxation of the States is certainly not necessary at the present time to maintain the federal government, and that it is highly improbable that the day will ever come when such necessity will exist.

In Point III we consider the alternative approach of the requirements for effective state government. Here we assume, for argument's sake, that the Court may prefer to retain the line between taxable and immune activities of the States in terms of the nature of the state function. If it is felt that any useful purpose is met by such distinctions, our analysis leads us to the following conclusion: that state immunity extends at least to those activities undertaken to promote the public welfare, health and safety even though they incidentally yield revenues.

Such an interpretation does not weaken the federal government and furnishes the States a much needed and adequate protection from federal interference. It is an interpretation which avoids putting a strait-jacket of federal taxation on the necessary activities of the States in a modern world. Freedom of local government to adapt itself to the changing necessities of the health, welfare and prosperity of its people is the very breath of our democracy. It is a rule which does no violence to precedent. It was the rule of the first Supreme Court case which considered the objection that a State's activity was not "governmental." *United States* v. *Baltimore & Ohio R. R. Co.*, 17 Wall. 322 (1873); it is the rule of the last two cases on the question:—*Brush* v. *Commissioner*, 300 U. S. 352 (1937);

Allen v. *Regents*, 304 U. S. 439 (1938). It does much to explain the cases of *South Carolina* v. *United States*, 199 U. S. 437 (1905), *Ohio* v. *Helvering*, 292 U. S. 360 (1934), and *Helvering* v. *Powers*, 293 U. S. 214 (1934). It is the only rule which is based on a difference in the nature of state functions and yet is consistent with the reasoning in the latest cases in the field of intergovernmental immunity, those regarding federal immunity. *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21 (1939); *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 98 (1941); *City of Cleveland* v. *United States*, 323 U. S. 329 (1945). It is, finally, a workable rule, easy to apply, not changing with changing philosophies of successive courts. It is a rule which would make it unnecessary for the Court to admit again that: "Looking backward it is easy to see that the line between the taxable and the immune has been drawn by an unsteady hand." *United States* v. *Allegheny County*, 322 U. S. 174, 176 (1944).

In Point IV we shall apply the conclusions reached in the first three Points to the specific questions asked by the Court. Our answers will be:

(1) Congress may not constitutionally include for taxation in a generally applicable taxing act any state property or activity or the income derived by the State from them or any other source, if no more is shown than (a) that the tax does not discriminate against the State or is not laid on the interest taxed merely because it is that of a State, and (b) that income of a private person from a like source may be constitutionally taxed. There is no present necessity for Congressional taxation of the States; on the other hand, the necessity for preserving the States as effective and functioning governmental units requires that immunity from federal taxation shall extend at a minimum to all activities undertaken by the States to promote the general welfare and to all property used therein and all income derived therefrom.

(2) A State may, by enlarging its property ownership or its activities, withdraw from the reach of the federal taxing power, property and income which are normally subject to federal taxation when owned or received by private persons, at the very least to the extent that the property is owned or the income derived in connection with an activity which the people of the State believe "should be rendered by the city (or State) itself as an appropriate means of discharging its duty to protect the health, safety and lives of its inhabitants." See *Brush* v. *Commissioner*, 300 U. S. 352, 371 (1937), and cases cited.

POINT I

A consideration of the proposition that intergovernmental taxation should be permitted if it is nondiscriminatory.

Let there be no mistake. A rule which would make discrimination the only test of the immunity of the States and the federal government from taxation by each other is not a test of immunity at all. It is the rejection of the doctrine of immunity. It would leave as the sole objection to taxation of a sovereign the same objection of discrimination which is available to any citizen of the sovereign. It would lower the government to the same plane as the private corporation. It would weaken the ties which have held the federal system together. It would not even have the virtue of ending a troublesome source of litigation between the States and the central government but would merely replace the old arguments with new questions as to what was a discriminatory tax and as to which classifications of the States and their agencies and their activities and their property are reasonable and which are unreasonable. See *Miller* v. *Milwaukee*, 272 U. S. 713 (1927); *Na-*

tional Life Ins. Co. v. *United States*, 277 U. S. 508 (1928); *Macallen Co.* v. *Massachusetts*, 279 U. S. 620 (1929); *Pacific Co.* v. *Johnson*, 285 U. S. 480, 493 (1932); *Schuylkill Trust Co.* v. *Pennsylvania*, 296 U. S. 113 (1935).

In introducing this point, we submit that it appears impossible to draft any income tax law which would not discriminate against the State, and would not tax the State's income because it is that of the State,—other than a law taxing all incomes alike at a single, flat rate without any exemptions or credits. Moreover, an attempt to do so would raise insuperable difficulties, due to the rule that to be constitutional, classifications for tax purposes must have a reasonable basis.

The considerations which validate the various classifications contained in the income tax provisions of the existing Internal Revenue Code from the constitutional standpoint are well known—those that justify taxing one individual at one rate and another at a higher rate or not at all, and that justify taxing corporations at different rates from either of them. They include ability to pay, the reasonableness of discriminating between large and small accumulations of *private* wealth, etc. These considerations have no application to the States.

Progressive tax rates involve taxing one State or City at a higher rate than another merely because its income is larger. Yet clearly to discriminate between States and Cities on the basis of the size of their income would be unconstitutional.

If we can conceive of federal income taxes on state and local tax receipts, it is apparent that the size of the tax receipts has no direct relation to ability to pay as in the case of private corporations. A metropolis like Detroit may be in dire straits with receipts in the millions of dollars while a small town may have much greater ability to pay percentagewise although its receipts are measured only

in thousands. Some tax formula would have to be evolved to meet the special circumstances of the State or municipality but then it appears that the ordinary provisions for the taxation of private corporations cannot apply. It is at once clear that there would immediately have to be a separate chapter in the Internal Revenue Code dealing exclusively with the taxation of the States and their agencies. Any conceivable federal program of taxing the income of the States would necessarily be leveled at the States because they are States.

The foregoing of course proceeds upon the assumption that an attempt is made to tax the revenues received from state and local taxation,—an assumption which may be implicit in the question whether Congress may tax "the income derived by the states * * * from any other source," although we are doubtful whether the Court intended such assumption to be made. The same result is reached however even if taxation of the tax receipts of the States and their agencies is not involved. In that case, presumably the attempt to tax would apply only to revenues of projects where charges are made. Here again, the application of any system of progressive income taxes to state and municipal revenues can have no reasonable basis.

Many unique problems are raised at once if the constitutional barriers against federal taxation of state and municipal income are let down.

An underlying and controlling factor is that each and every piece of state or municipal property and each and every dollar of state or municipal income belongs to the people of the States, being held in trust for them by the state or local government. In the case of a State, are all its subordinate agencies, incorporated or unincorporated, including its political subdivisions to be consolidated for the purpose of filing a single return, or is each state agency to be considered an independent undertaking for income

tax purposes? Should a City be required to file a single return reporting its income from pier rentals, airport rentals, water charges, bridge tolls, museum admissions, college tuitions and transit fares, or should each separate activity be considered a unit? A state activity which produces revenues may be only one part of a public project, the whole of which produces no surplus; is the revenue producing portion of the project to be isolated and a federal tax on its income required? Are the State and the City to be permitted to deduct from their normal and ordinary expenditures in carrying on state and municipal affairs? In the case of a State or City or Authority or Commission or District, is the cost of erecting a schoolhouse to be considered a capital improvement or a deductible operating expenditure? Is the repayment of public debt to be considered a proper deduction against gross revenues, in addition to the normal private deduction for interest only?

The suggestion that there may be federal taxation of the income of the States and their agencies is too new and revolutionary to permit appreciation of the enormous number of unique problems which it would occasion. But one thing is certain,—that it is impossible to think in terms of equal treatment of state and private income. For that reason, the condition inserted in the first question asked by the Court in this case cannot materialize. It is impossible for Congress to include state income in a generally applicable taxing act which "does not discriminate against the State" or "is not laid on the interest taxed merely because it is that of a State."

Wherever it has been argued that absence of discrimination removes all constitutional objections to a tax by one government of the agencies of the other, this Court has rejected or ignored the argument. *Dobbins* v. *Commissioners*, 16 Pet. 435 (1842); *Bank of Commerce* v. *New York City*, 2 Black 620 (1863); *Collector* v. *Day*, 11 Wall. 113 (1871); *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S.

429 (1895); *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937); see also *Helvering* v. *Gerhardt*, 304 U. S. 405, 413 (1938).

I. Taxation of One Sovereign by Another Is Repugnant to the Concept of Sovereignty.

We shall first consider the doctrine of immunity apart from precedent, both as it squares with the philosophy of sovereignty and as a practical necessity for the preservation of our federal system. We shall then consider the actual effects on our federal system and on state finances should the Court, at this late date, strike down the established immunity under which the States and their political subdivisions have developed their local institutions and public activities.

Both the States and the federal government are sovereign. Indeed, the States, under the Tenth Amendment, are the ultimate repository of all sovereignty not delegated to the federal government, so that their sovereignty is in a sense fuller. Taxation is an exercise of sovereignty—it is not a process which normally acts *upon* the sovereign. There is normally no program of taxing sovereignties because there is normally only one sovereign in any given territory. But the genius of the American constitutional system is its concept of a federalism within which two coordinate sovereigns must coexist, each acting in the same territory.

Taxation of one government by another is demeaning to the sovereignty of the former. It implies a subordination of the taxed to the taxing government which does not exist in our American federal system.

Taxation is generally an exaction by or under the authority of the sovereign either solely to raise revenues for its support or also for regulatory purposes. But neither the

States nor the federal government are sovereign over the other. Neither has that authority over the other which is the essence of the power to tax.

Under the concepts of our federal system, only reciprocal immunity is sound unless there is to be reciprocal taxation *in toto*. We believe this because we believe in the supremacy of both the States and the federal government in their respective spheres. Arguments drawn from dicta that immunity should be a monopoly of the federal government because of its "supremacy" do not square either with accepted constitutional doctrine or good public policy. The supremacy of the central government in its sphere received formal recognition in the Constitution. The supremacy of the States in their sphere was just as formally recognized when it was reserved in the Tenth Amendment. Yet Chief Justice MARSHALL regarded both of these clauses as surplusage and said that the same result would have had to be implied anyway from the nature of the powers delegated and withheld. See *M'Culloch* v. *Maryland*, 4 Wheat. 316, 405, 406 (1819).

This is the reply to the suggestion that the federal power to tax is supreme over the States' power to perform their functions and that the federal government's power to perform its functions is supreme over the States' power to tax, so that only the federal government may claim immunity. The confusion in this suggestion is between the sphere of federal activities and the machinery by which the federal government may support itself. The power to regulate interstate and foreign commerce is part of the federal government's sphere in which it is supreme; its power to tax is mere machinery. The supremacy of the federal government is only in its special sphere—it does not attach to the taxing machinery.

This has been said in many Court opinions. For example, when the United States argued in 1871 against any reciprocal state immunity in *Collector* v. *Day* on the

ground that only the United States is supreme, this Court answered:[1]

> "The general government, and the states, although both exist within the same territorial limits, are separable and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the states within the limits of their powers not granted; or, in the language of the 10th Amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states. * * *
>
> "The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality * * *."

2. The Value of the Federal System.

No one can take issue with this Court's statement "that the preservation of the States, and the maintenance of their government, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states." *Texas* v. *White*, 7 Wall. 700, 725 (1869). The necessity of the States and the federal system of independent local government was very clear in the minds of the founders of the nation.

During the debates on the adoption of the Constitution in 1787, we find it recognized that

> "no extensive empire can be governed upon republican principles, * * * such a government will degen-

[1] 11 Wall. 113, 124, 126 (1871).

> erate to a despotism, unless it is made up of a confederacy of smaller states, each having the full power of internal regulation. This is precisely the principle which has hitherto preserved our freedom."[1]

a proposition which, incidentally, has been recognized in the organization of the United Nations.

Marshall said in 1819, "No political dreamer was ever wild enough to think of breaking down the lines which separate the states and compounding the American people into one common mass."[2]

Yet a generation later, in his farewell speech at Harrisburg, Andrew Jackson still felt it necessary to warn against the danger of the encroaching power of the federal government:[3]

> "It is well known that there have always been those amongst us who wish to enlarge the powers of the General Government; and experience would seem to indicate that there is a tendency on the part of this government to overstep the boundaries marked out for it by the Constitution. * * * There is but one safe rule, and that is, to confine the General Government rigidly within the sphere of its appropriate duties."

Through the years, the greatest Americans have felt the importance of the federal system keenly enough to warn against the destruction of the States. An outstanding statement is by Charles Evans Hughes:[4]

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[1] P. L. Ford—Pamphlets on the Constitution of the United States Published During Its Discussion by the People, 1787-1780.

[2] *M'Culloch* v. *Maryland*, 4 Wheat. 316, 403 (1819).

[3] Gen. Jackson's Farewell Address to the People of the United States together with his Proclamation to South Carolina, Harrisburg—Printer, J. M. G. Lescure, 1850.

[4] Report of New York State Bar Association, Volume XXXIX (1916), pp. 273-274. Italics supplied.

"But in the face of the difficulties already upon us, and destined to increase in number and gravity, we remain convinced of the necessity of autonomous local governments. An overcentralized government would break down of its own weight. It is almost impossible even now for Congress in well-nigh continuous session to keep up with its duties, and we can readily imagine what the future may have in store in legislative concerns. If there were centered in Washington a single source of authority from which proceeded all the governmental forces of the country—created and subject to change at its will—upon whose permission all legislative and administrative action depended throughout the length and breadth of the land, I think we should swiftly demand and set up a different system. *If we did not have States we should speedily have to create them.* We now have them, with the advantages of historic background, and in meeting the serious questions of local administration we at least have the advantage of ineradicable sentiment and cherished traditions. And we may well congratulate ourselves that the circumstances of the formation of a more perfect Union have given us neither a confederation of States, nor a single centralized government, but a Nation—and yet a Union of States each autonomous in its local concerns."

Woodrow Wilson said:[1]

"The development of the United States would have been as impossible without the state governments as the original establishment of our federal system would have been. They have furnished us with an ideal means of integrating a vast and various population, adapting law to changing and temporary conditions, modulating development, and permanently securing each item of progress."

He also said:[2]

"It would be fatal to our political vitality really to strip the States of their powers and transfer them to the federal government."

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[1] *Constitutional Government in the United States*, at page 50.
[2] *Id.* at p. 191.

Since free local government is the whole basis of democracy, it naturally had no existence under fascist domination in European countries. In Italy, the Fascist dictatorship, in its attack upon all things democratic, dispersed the locally elected municipal councils and set up in their place a municipal officer appointed by the central government.[1] In Germany the democratic Weimar Republic had given large measures of self-government to the cities. With these new found and, alas, short-lived freedoms, the German cities had greatly enlarged their municipal services, extended local suffrage, and might eventually have afforded the German people a primer in democracy of their own choosing. But this local self-government was one of the first victims of the Nazi hate for all things democratic.[2] And today, in trying to rebuild a democratic Germany which will not again imperil the whole world, our occupying forces are beginning with local self-government as the foundation.

Among our South American neighbors, weakness of local government goes hand in hand with recurrent dictatorships. Even Brazil, which originally had a federal form of government similar to ours, lapsed into dictatorship after the States had come under the control of Rio de Janiero. "Vargas struck at the entrenched rights of the separate states; * * * and abolished the independent state judiciaries; he is running Brazil with federally appointed interventors * * *."[3]

The lesson of our times bears out the warnings of Jackson, Wilson and Hughes: dictatorship destroys local self-government and works through centralized authority; and inversely, where local self-government is weakened and centralization advanced, the groundwork is laid for

[1] The Municipal Scene in 1939, by Prof. William Anderson, University of Minnesota, in the Municipal Year Book 1940, pp. 1, 2.

[2] *Ibid.*

[3] Inside Latin America, by John Gunther (1941).

dictatorship and the loss of democracy and human liberties. Thus, Franklin D. Roosevelt said:

> "We are safe from the danger (of oligarchy) just so long as home rule in the States is scrupulously preserved and fought for whenever it seems in danger."[1]

And again he said:[2]

> "* * * it was clear to the framers of our Constitution that the greatest possible liberty of self-government must be given to each State, and that any National Administration attempting to make all laws for the whole nation, such as was wholly practical in Great Britain, would inevitably result at some future time in a dissolution of the Union itself."

But preservation of American democracy is not the only issue in preserving our federal system. The whole world is groping today for a formula under which nations can unite for mutual self-protection without surrendering their sovereignty and local independence. We solved that problem in 1789 when we fashioned a federal system and made it work. That example is the greatest single contribution Americans can make toward the order of a postwar world. If our original thirteen nations could retain local independence and yet unite and forever ban war between them, the world can hope for an effective United Nations Organization. But it would be a mockery if the American States and local government should be under attack from within, at the very moment that the world turns to us as the exemplar of sovereign cooperation. Hopes for world cooperation would receive a sharp setback if our States should crumble, and new strength would be given to the argument that international cooperation should not be at-

[1] March 2, 1930.

[2] Quoted by the New York Times, September 17, 1937, p. 24.

tempted because it would end in the destruction of national self-determination in purely national concerns just as the States would be superseded in purely local concerns.

If we have labored the point that state independence must not be jeopardized, it is because no argument for state immunity can appeal unless there is a deep conviction that our federal system is worth retaining and that it is the bulwark of all our freedoms.

The reciprocal immunity rule was devised to protect that system. See *South Carolina* v. *United States*, 199 U. S. 437, 448 (1905); *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 392 (1931); *Helvering* v. *Powers*, 293 U. S. 214, 225 (1934). It remains to show that it is necessary to the preservation of that system and the independence of the States.

3. Even as an Original Proposition, Immunity Would Be Necessary to Avoid Disruption of Our Federal System.

The rule of reciprocal immunities has always been considered a rule of necessity to preserve our federal system from actual destruction. It was in that real sense that *M'Culloch* v. *Maryland*[1] sought to preserve the federal government in the field in which it is supreme. And it was in the same sense that *Collector* v. *Day*[2] announced the immunity of the States in order to preserve their supremacy in their field. The rule is one of preservation of the federal system. It was to preserve the system that the immunity was applied first to the infant federal government when it needed protection from the ascendancy of the States; and it was for the same practical purpose that immunity was applied later to the States when they first required protection from a federal government whose security was established with the Civil War. The nec-

[1] 4 Wheat. 316 (1819).
[2] 11 Wall. 113 (1871).

essities of preserving the federal system apply equally to both state and federal governments in that system. No conceptual idea of federal supremacy in its sphere can restrict the logic of the rule to the federal government alone.

We shall not fall into the error of merely repeating Chief Justice MARSHALL's great pronouncement that "the power to tax involves the power to destroy." The phrase has been called a seductive cliché, yet its seductiveness lies in its fundamental truth when the opponents of the tax meet their obligation to explain wherein the challenged power to tax does in fact involve the power to destroy.

The way in which federal taxation would actually work toward the destruction of the States is not difficult to apprehend.

a. *Disruption by Regulation.*

Assume, for the moment, that the federal government had the power to tax the States by a non-discriminatory tax. The power to tax has always been held to contain the corollary power to make reasonable classifications of the objects to be taxed.[1] We assume, then, that the federal government would have the power to exempt certain state and local activities or property or income, while taxing all the rest. For example, the policy of the Treasury Department has for years been to secure taxation of the obligations of state and local governmental agencies generally—but not of local housing authorities. At some future time federal policy might favor activities which are self-liquidating as against activities which draw upon taxation for their support or vice versa.

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[1] *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24 (1916); see also *National Paper & Type Co.* v. *Bowers*, 266 U. S. 373 (1924); *Barclay & Co.* v. *Edwards*, 267 U. S. 442 (1924).

Taxation would, of course, discourage certain lines of state and municipal endeavor, while exemption would encourage other activities. The policy which would determine what local activities should be encouraged and what functions discouraged would not be local policy as it is at the present time, but a new and dominant federal policy. In other words, with the power to tax the States, the federal government would have a devastating power to substitute its idea of policy and propriety in purely local matters for the policy of the local governments. Local self-government would be so impaired as to be, in effect, destroyed. The syllogism is clear. The power to tax involves the power to exempt and the power to classify between taxable and exempt objects. The power to classify is the power to control and regulate. And once a sovereign is subject to the control and regulation of an outside sovereignty it is effectively destroyed; it ceases to act for itself and becomes a mere tool of the regulatory power.

For example, suppose that a federal government with power to tax all state activities, chose to exempt activities supported by taxes, but not activities supported by charges against the users. In the main, the revenues of these projects would not be sufficient to amortize the construction debt if heavy federal taxes were a charge on revenues ahead of amortization. Consequently, the economic pressure thus exerted would be to compel local abandonment of the policy of self-liquidating public enterprises. No State could be expected to resist the effort of the federal government to compel abandonment of self-liquidating enterprises if the alternative is to dip into tax receipts in order to support them. Yet, we submit, that the choice of such a policy in a purely local matter cannot, by the remotest stretch of the imagination, be considered as one proper for decision by the federal government.

The way in which the power to tax entails the power to regulate is illustrated by legislation now pending in

Congress. H. R. 2014 proposes to tax state and municipal revenue bonds used to finance the purchase of private utility systems by States or municipalities; otherwise it leaves the statutory exemption of state and political subdivision bonds undisturbed. From the announcement accompanying the introduction of the legislation, it appears that the objection is not to immunity of public obligations generally, but rather to the public purchase of private utilities by the use of revenue bonds. Investigation disclosed that the author of the bill objected specifically to the purchase of the Nebraska Power Company by an agency acting for the City of Omaha, the purchase being from the American Power and Light Company, a utility holding company under order of dissolution pursuant to the Public Utility Holding Company Act of 1935.

The suggestion soon appeared in another guise in hearings before a subcommittee of the House Committee on Interstate and Foreign Commerce charged with investigating the effects of the Public Utilities Holding Company Act. The chairman of the subcommittee took up the charge and specifically referred to the same public purchase of the Nebraska Power Company on behalf of the City of Omaha. The objection seems to be to payments made for the local utility properties which, in the opinion of the chairman, were excessive.[1] The use of this particular type of obligation was labelled "primarily for tax evasion."

Yet, as a matter of fact, this particular purchase of utility properties in Nebraska followed several years of public discussion and a special investigation by a committee of the Nebraska State Legislature.[2] The transaction was made possible by specific legislation of the State. Legis-

[1] New York Times, July 7, 1945.

[2] Final Report of the Nebraska Legislative Council, Sub-Committee on Public Power, dated September 27, 1944.

lature.[1] It was an issue of substantial prominence in the political and public life of Omaha for several years[2] and it was resolved in accordance with the decision of the representatives of the people in the city and state governments.

It would seem that the question of whether the City should purchase the property at all, the price to be paid and the method of financing the purchase were all matters for purely local decision. Yet, it has occasioned introduction of federal legislation intended to make such transactions impossible by carving out an exception to the general exemption of state and municipal obligations. The pendency of this legislation and the discussion of the merits of the local transaction in Congress at this time illustrate the way in which the power to tax state and municipal obligations, coupled with the power of selective exemption, would permit the federal government to substitute federal policy for local policy in purely local fields and to embark upon a regulation of local affairs of a type which would destroy the independence of the States. It shows more. It shows that if the power existed, there would be a will to exercise it.

Similarly, the federal policy might oppose solution of regional problems by interstate compact rather than through direct federal action. Such a policy might prompt taxation of joint state activities while exempting individual state action.[3]

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[1] LB-204 enacted at the 56th Session of the Nebraska Legislature, and approved by the Governor on May 26, 1943; additional legislation was adopted May 7, 1945 and was approved by the Governor on May 8, 1945.

[2] See Omaha Sunday World-Herald, Dec. 31, 1944; Omaha Morning World-Herald, January 1, 1945; Report of the Civic Committee on Power, published in Omaha Sunday World-Herald, February 18, 1945.

[3] The United States Attorney General argued for such a classification in *Commissioner* v. *Estate of Shamberg*, 144 F. (2d) 998 (1944), cert. den. 89 L. ed. Adv. Ops. 282 (1945).

Even with their present immunity the States are often without adequate resources to enable them to discharge their full duty to provide for the welfare of their people. Congress has recognized this fact and has tried by grants-in-aid to increase the resources of the States.[1] While such grants may help the economic situation of the States, they certainly weaken their independence and subject them to a great measure of federal control. If the States were to become taxable, the grants by the federal government would probably have to increase. The power to tax the States, therefore, would add little net gain to the resources of the federal government but would greatly increase the measure of federal control over the States' activities in the purely local sphere. This is borne out in the history of conditions annexed to the grants by the Public Works Administration and by the minute supervision of local governments in all their expenditures of the monies granted by the federal government.

Even the most "reasonable" classification, which could not at all be classed as "discriminatory" in a constitutional sense, would subject the States to pressures and controls which would destroy their independence.

b. *Disruption by Curtailment of Ability to Provide Services.*

Disruption, however, would come not from regulation alone. Atrophy through lack of funds to perform essential activities would be equally destructive of state government as it was to the central government under the Articles of Confederation. For example, suppose that a community wanted to organize an irrigation district, but the project was marginal in the sense that the anticipated cost of operation and amortization was close to the estimated maximum income. The project might be successfully accomplished if the added burden of federal taxation was not

[1] See Congressional Record, Oct. 22, 1945, p. 4766.

thrust upon the local government. A tax on the bonds to be issued would increase interest costs, and a tax on the operating surplus needed to amortize the cost of the project would make it impractical. The result would be that a service earnestly desired by the people of the locality would be destroyed before conception, by the mere federal power to tax. The result would be that a service would be foregone and the federal government would not even have the consolation of collecting the tax.

If the federal government could tax the properties and activities of the States the burden of that taxation would have to result either in increased federal grants or in the decrease of state activities or in an effort to increase the States' revenues to meet the added cost. Probably all would be attempted. The limited ability of the States to increase their revenues to meet the cost of a federal exaction, we shall treat below. But there would, inevitably, be a decrease in the quantum and quality of the public service which the States and Cities could continue to render if they were saddled with a great added burden of millions of dollars a year in federal taxes. And because local government in democratic America does not exist for itself, but only to provide for the welfare of its people, we may truly say that such an effect of the tax would be at least partial destruction of state government.

The same problem involves an even greater danger. The curtailment of local functions because of federal taxes would not be the end of the matter. It is not likely that these services, really desired by the people, would be readily surrendered. A vacuum is as abhorrent to the laws of political science as to the laws of physical science. Inevitably, there would be a strong tendency for the federal government, the recipient of the money of which the States would have been deprived, to move in and take over the functions which the local governments were forced to give up. While the States do not seek a competitive advantage

over private business, they must not be placed in the field of government itself at a competitive disadvantage with the federal government. The federal government may either tax itself or exempt itself; it makes no difference, because the taxing and the taxed pockets are the same, so that, in effect, the federal government is always exempt from its own taxation. If the States are taxed and the federal government thus, of necessity, continues exempt, the economic ability of the federal government to expand its activities at the expense of the States would create an irresistible trend toward ever greater centralization with all its inevitable evils in governmental and human values.

We cannot conceive that a Constitution which presupposes the continued existence of both state and federal governments as effective instruments of government, with powers in delicate balance, can be said to countenance taxation which can only result in a dislocation of the federal system and a vast enhancement of the federal sphere at the expense of the States. These are the arguments which have induced this Court in a score of cases to deny the federal government the power to tax the States, even though the tax is labelled non-discriminatory.

4. State Representation in Congress Is No Substitute for a Constitutional Guarantee of Immunity.

Of course what the Constitution forbids, Congress cannot do, even though it consists of the representatives of the people of the States. The essence of constitutional government as distinguished from parliamentary government is that there is a greater limit on the authority of the representatives in the Legislature than their own idea of the best interests of their constituents. This Court has always insisted that the acts of the people's representatives in Congress, no matter how well intentioned, are subordinate to the Constitution which is the highest law of all. It is, therefore, strange to find a hint in recent

dicta that where the protection of the independence of the States and the integrity of the Tenth Amendment are involved, a different philosophy may exist. See *Helvering* v. *Gerhardt*, 304 U. S. 405, 412 (1938). It is one thing to argue, as Marshall did in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 435, 436 (1819), that the lack of federal representation in State Legislatures is a reason to forbid the States' taxation of federal institutions. It is a complete *non sequitur* to conclude that representation in Congress is a complete answer to Congressional action challenged as unconstitutional.

One of the prime purposes of a constitution in a democracy like ours was to protect certain fundamental rights of minorities from interference by the representatives of the majorities. When a citizen has complained that his rights of free worship, free speech, free assembly, are abridged by Congressional action, it has never been an answer that his representatives in Congress have adopted the legislation. We can imagine no theory more abhorrent to the constant American effort to safeguard human liberties. If our view is sound, it exposes the fallacy of answering the question of state immunity in terms of representation of the people of the States in Congress.

In a country as tremendous and diverse as ours, the interests of the States are rarely identical—over many issues they fall into majority and minority groups just as their people do. The representatives of a majority of States can outvote the representatives of the minority. The representatives of no single State have the veto power in Congress. Twenty-one coastal States have peculiar problems not common to twenty-seven inland States. The arid land States have common interests not shared by the New England States. Predominantly industrial States may not appreciate the problems of agricultural States. But standing above all this clash of interest is the Constitution which seeks to keep the balance between state and federal governments outside the field of legislative controversy.

The argument that since the States are represented in Congress they are capable of protecting themselves, begs the whole question of constitutionality. The dubious protection of a majority in Congress is no substitute for the rights guaranteed to the States by the Constitution itself. The whole principle of constitutionalism is that those rights are inviolable, Congressional majority or no Congressional majority. The suggestion that the sovereign position of the States must find its only protection in the will of a transient majority of Congress is a negation of the entire federal system.[1]

There is another great fallacy in suggesting that representation is adequate protection of the States from federal destruction. The plain fact is that since the adoption of the Seventeenth Amendment, the state governments, as such, are no longer represented in Congress. The Congressman or Senator is a part of the federal government and not of the state government. There is nothing in the nature of his office which prevents him from feeling that those people would be better served if the national government of which he is a part, should dominate the state government of which he is not a part.

The argument that the States must rely for their protection only upon their representation in Congress smacks of the old "confidence" theory. It asks each State to place its trust not in the Constitution, as expounded by this Court, but in its representatives and the representatives of other States in the federal Congress. The answer might well be:[2]

> "But is this a case of confidence? Would the people of any one State trust those of another with

[1] See "Views of the Minority of the Special Committee on Taxation of Governmental Securities and Salaries, created by S. Res. 303 (75th Congress)," 76th Congress, 3rd Session, Report No. 2140, Part 2, p. 31.

[2] *M'Culloch* v. *Maryland*, 4 Wheat. 316, 431 (1819).

> the power to control the most insignificant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided the most important and valuable interests?"

How dangerous it is to rely solely on "confidence" in representation is shown by the recent history of the Australian States. The process began with a decision in 1920 weakening the doctrine of reciprocal immunities.[1] It ended with the destruction of the States in 1942 in *South Australia* v. *The Commonwealth*, 68 C. L. R. 373. That case upheld the constitutionality of four Commonwealth Acts which stripped the States of the power to levy income taxes and substituted a system of direct subsidies to compensate for the loss of revenues. To make assurance doubly sure the Commonwealth took over all state officers engaged in income tax assessment or collection and all equipment of the States for such administration. The statutes were bitterly attacked by all the Australian States as a deliberate scheme to preclude the States from securing the necessary revenues to function as States. The Court admitted the "scheme," saying, "The legislation which is attacked is not colourable —it admits its character upon its face." To the charge that state sovereignty was destroyed the Court said (65 C. L. R 373, 421):

> "It is unnecessary in the present case—and probably unnecessary in any purely legal controversy—to consider in what sense a State which is part of a Federal Commonwealth under the British Crown, can be said to be a 'sovereign state.'"

This decision was recognized in Australia as the end of their federal system and the sovereignty of their States.

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[1] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co., Ltd.*, 28 C. L. R. 147 (1920).

The New York Times of July 26, 1942 carried the following dispatch from Canberra, Australia:

> "By Federalists and Unificationists alike the High Court's judgment validating a uniform income tax for Australia is regarded here as a landmark in constitutional history.
>
> "Former Prime Minister Robert Gordon Manzies, who doubted the validity of the legislation while approving its objective, declared it marked the end of the federal era in the constitutional relations of commonwealth states and the beginning of a new era in which the Government of Australia must be regarded as much more a unitary government and much less a federal system than it was previously thought to be. * * *
>
> "The unificationists consequently welcome the judgment as a first step toward great constitutional changes that will rapidly reduce the States to a subordinate position resembling that of the Provinces of South Africa."

According to another report from Canberra:[1]

> "it has been said that the taxation power now given to the Federal Treasurer is so great that he is just as much in control of the States as if his nominees were Premiers in each of them.
>
> "Moreover the High Court emphasized the paramount position of the Federal Government when the Chief Justice declared the Commonwealth could end the political independence of the States and this could not be prevented by any legal decision."

Australia is a warning to us of the necessity of constitutional protection of the States beyond any safeguards they receive from their representation in Congress.

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[1] The Christian Science Monitor, Boston, July 31, 1942, p. 5.

5. The Place of Precedent.

The basic immunity of the States even from non-discriminatory federal taxation has often been asserted and never questioned by this Court. The rule was not called into play regarding the States until the first federal act which might have been construed to tax state instruments (Stamp Act of June 30, 1864). The power of Congress to impose such taxes was immediately challenged in the State Courts beginning in 1864, and state immunity was unanimously upheld by the highest Courts of eleven States.[1] A dictum of this Court in *Veazie Bank* v. *Fenno*, 8 Wall. 533, 547 (1869) expressed this Court's agreement with the doctrine of state immunity. The opinion says:

> "It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State Government, are not proper subjects of the taxing power of Congress."

From that day to this, this Court has unequivocally upheld the doctrine of state immunity in dozens of opinions: *Collector* v. *Day*, 11 Wall. 113 (1871); *United States* v. *Baltimore & Ohio R. R. Co.*, 17 Wall. 322, 327 (1873); *Railroad Co.* v. *Peniston*, 18 Wall. 5, 30 (1873); *Mercantile Bank* v. *New York*, 121 U. S. 138, 162 (1887); *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 584, 601, 652, 653; 158 U. S. 601, 630, 666, 693 (1895); *Plummer* v. *Coler*, 178 U. S.

Smith v. *Short*, 40 Ala. 385 (1867); *Bumpass* v. *Taggart*, 26 Ark. 398 (1870); *Duffy* v. *Hobson*, 40 Cal. 240 (1870); *State of Georgia* v. *Atkins*, 35 Ga. 315 (1866); *Latham* v. *Smith*, 45 Ill. 29 (1867); *Griffin* v. *Ranney*, 35 Conn. 239 (1868); *Warren* v. *Paul*, 22 Ind. 276 (1864); *State* v. *Garton*, 32 Ind. 1 (1869); *Eifield* v. *Close*, 15 Mich. 505 (1867); *Clemens* v. *Conrad*, 19 Mich. 170 (1869); *Davis* v. *Richardson*, 45 Miss. 499 (1871); *Haight* v. *Grist*, 64 N. C. 739 (1870); *Jones* v. *Keep*, 19 Wisc. 390 (*369) (1865); *Sayles* v. *Davis*, 22 Wisc. 217 (*255) (1867).

115, 117, 118 (1900); *Ambrosini* v. *United States*, 187 U. S. 1, 7 (1902); *Snyder* v. *Bettman*, 190 U. S. 249, 253-254 (1903); *South Carolina* v. *United States*, 199 U. S. 437, 452-454, 465 (1905); *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 147 (1911); *Farmers & M. Savings Bank* v. *Minnesota*, 232 U. S. 516, 526, 527 (1914); *Evans* v. *Gore*, 253 U. S. 245 (1920); *Metcalf* v. *Mitchell*, 269 U. S. 514, 521-523 (1926); *National Life Ins. Co.* v. *United States*, 277 U. S. 508, 521 (1928); *Willcuts* v. *Bunn*, 282 U. S. 216, 224, 225 (1931); *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 389 (1931); *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, 282 (1931); *Susquehanna Power Co.* v. *State Tax Commission*, 283 U. S. 291, 294 (1931); *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 575, 579, 580 (1931); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 399, 400, 411 (1932); *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 128 (1932); *Burnet* v. *A. T. Jergins Trust*, 288 U. S. 508, 513, 514 (1933); *Trinityfarm Construction Co.* v. *Grosjean*, 291 U. S. 466, 471 (1934); *Helvering* v. *Powers*, 293 U. S. 214, 224, 225 (1934); *United States* v. *California*, 297 U. S. 175, 184 (1936); *Ashton* v. *Cameron County Water District No. 1*, 298 U. S. 513, 528-531 (1936); *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 315 (1937); *Brush* v. *Commissioner*, 300 U. S. 352, 360, 374, 375 (1937); *Hale* v. *State Board*, 302 U. S. 95, 107, 109 (1937); *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 152, 153, 157 (1937); *Helvering* v. *Therrell*, 303 U. S. 218, 223 (1938); *United States* v. *Bekins*, 304 U. S. 27, 52, 53 (1938); *Helvering* v. *Gerhardt*, 304 U. S. 405, 415 (1938); and *Allen* v. *Regents*, 304 U. S. 439, 453, 457 (1938).

Our own view of the importance of precedent in our judicial system is drawn from Mr. Justice CARDOZO's philosophy, in his "Nature of the Judicial Process:"[1]

> "I think adherence to precedents should be the rule and not the exception."

[1] Page 149. See also Report of New York State Bar Association, Vol. LV (1932), p. 271.

He stated the limited field in which the exception operates:[1]

> "I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.
>
> * * *
>
> "If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors."

In the field of reciprocal intergovernmental immunities the arguments for the rule control, and those for the exception do not. None of the reasons for reversal which are suggested by Mr. Justice CARDOZO apply in this case; many sound arguments against it would exist in addition to the arguments we have already given. We are not in a field of sociology and changing *mores*. There is no question of injustice to private individuals because of an unfair exemption of public salaries.[2] Here the question is whether certain activities are to be exercised at all or by the federal government instead of by the States; and whether the federal government shall gather revenues by taxation of the States or the States shall be left free to devote those sums to local government, according to their own policies. It is a choice between free and regulated local government.

This is a great question of the form of our federal system and the balance of powers within that system. There is no change in the need for that balance. The lesson of rampant centralization and dictatorship in other lands points rather in the direction of a greater need today for

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[1] *Id.* at pp. 150, 152.

[2] *Cf. Helvering* v. *Gerhardt*, 304 U. S. 405 (1938).

the protection of our States than when the rule was first fashioned. The form of our government is too fundamental a concern for such changes to be undertaken judicially rather than by constitutional amendment.

We shall show more fully in Point II that no change in precedent is necessary to avoid a threat to the revenues of the federal government. The federal government has never collected revenues from the States, except small excise and license taxes in connection with the sale of spiritous liquor[1] and from taxes on admissions to amusements furnished by the State.[2] None of the host of other activities of state government have yielded any revenues to the federal treasury. Yet in a time of federal need which will probably never be surpassed, the federal government was able, in the last few years, to raise unprecedented billions of dollars of revenues to support itself and was able to carry on with practically no contribution from taxation of the States, their public projects and their statewide and municipal activities. For the past forty or fifty years the States and their agencies have been operating water systems, toll bridges, local utility systems, ferries, municipal transit systems and various local utilities without paying federal taxes thereon. It is in such a setting and with such a background of state and local custom and practice that the federal government was able to increase its tax revenues from $1,891,290,000 in 1932 to $7,818,365,000 in 1941[3] and to $46,456,554,000 in 1945.[4] In the light of such federal re-

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[1] See *South Carolina* v. *United States*, 199 U. S. 437 (1905); *Ohio* v. *Helvering*, 292 U. S. 360 (1934).

[2] *Allen* v. *Regents*, 304 U. S. 439 (1938). Whether this was a tax on the State or on the patrons was not decided; it was only decided that in either event the tax was valid.

[3] U. S. Dept. of Commerce, Bureau of the Census, State and Local Government Special Study No. 20, "Financing Federal, State and Local Governments: 1941" (Sept. 1942), Table 9.

[4] Gross revenues were $47,739,524,339; payment into the Old Age and Social Insurance Trust Fund was $1,282,969,759. Daily Statement of the Treasury Department, June 30, 1945.

sources the usual argument that state or local activities are endangering the ability of the federal government to carry on its functions, becomes utterly ridiculous.

In the face of this fact, we cannot see that the immunity of the state governments has ever threatened the destruction of the federal government by withdrawing vital sources of federal revenues.

6. Reversal of Precedents at This Time to Permit Taxation of All State Activities Would Disrupt State Fiscal Systems Established on the Basis of the Law as It Stands.

Although it is enough to support an established doctrine that there is no sound reason to change it, the States can list many compelling reasons against such a change.

Despite the breadth of the first question propounded by the Court, we necessarily assume that the Court did not intend to suggest the possibility of federal taxation of tax revenues received by the state and municipal governments. The effect upon state and municipal fiscal affairs of such a tax is obvious. Accordingly, the consequences of federal taxation as they are considered in the ensuing portions of this brief are confined to the chaos in state and municipal finances that would be brought about by any declaration by this Court that the federal government had the power to tax state and municipal activities, property and income other than tax revenues.

If the doctrine of intergovernmental immunity had not been established as part of the very fabric of our federal system, the relations between the federal and state governments would have proceeded on a very different course from that recorded in the history of the past 150 years.[1] The power to tax incomes without apportionment might not have been ratified by the States in its present form.

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[1] See cases cited pp. 31-32, *supra*.

The debates in Congress and in the State Legislatures at the time of its adoption demonstrate that very clearly.[1] When the Sixteenth Amendment was before the States for ratification, this Court had held them to be immune from federal taxation except when engaged in "ordinary business activities;" it was doubtless upon their faith in the permanence of the basic immunity that the States elected to ratify the amendment. If this principle of law had existed, the municipalities might not have consented to a reliance on real property taxation as their almost exclusive source of tax revenue. They might not have found it necessary, as a consequence, to place so many of their public projects on a self-supporting basis charging the cost of the facility directly to its users rather than against the general public in the form of general taxes. But the immunity rule was implicit in the Constitution and was never questioned. The fiscal affairs of the States and the municipalities have now been tied indissolubly to that interpretation of the Constitution.

A decision that Congress has the power to tax state and municipal activities, property and income (even apart from tax revenues) would at once impair their credit. Though Congress retained or even expanded all existing statutory exemptions as a matter of federal grace, the mere proclamation of a federal power to tax them would irreparably damage the credit position of the States and municipalities. The revenue laws are revised too often for investors in public securities to place as great a reliance on a statutory exemption as on a fundamental constitutional immunity.

An affirmative answer to the first question asked by the Court on re-argument in this case would at once depress the prices of all outstanding state and municipal obligations and would tremendously increase the interest rates which the

[1] See *Evans* v. *Gore*, 253 U. S. 245, 261 (1920).

States and municipalities would have to pay in all future borrowing. This would not only be because the loss of immunity of the States themselves would inevitably mean the loss of the constitutional immunity of their obligations.[1] Investors would also be faced with the fact that the States and municipalities themselves would be liable to an income tax upon their public works which would greatly reduce the funds available for the repayment of their general obligations as well as their revenue obligations. Thus, a decision upholding the power to tax would impair state and municipal finances even if by congressional forbearance the federal government derived no corresponding revenue benefit.

There are outstanding today about $1,745,000,000 of state and municipal bonds payable principally from the revenues of particular projects and an additional $800,000,000 of special assessment bonds.[2] Furthermore, the entire structure of municipal credit is so interwoven with dependence on charges for municipal services that the whole credit base would be undermined by any proclamation by this Court that the federal government had the power to tax those revenues.

Over the whole country annual non-tax revenues collected by state and local governments amounted to $2,265,645,000 in 1941. This included $1,109,053,000 of non-tax

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[1] The effect of the loss of bond interest immunity is illustrated by the effect of the mere pendency of the question before this Court in *Commissioner* v. *Estate of Shamberg*, 1944 October Term, Docket No. 707. Even though both lower courts had upheld the exemption of the bonds of the agency involved, a recent issue was selling on the morning of January 2, 1945 at 97% of par. Four hours after this Court denied certiorari that same day, the same bonds sold at 100% of par, and within three months the price rose to 103¾% of par. The resulting drop in interest yield attributable to the assurance of exemption was from 2.14% to 1.63%. The reduced rate has resulted in substantial public savings to date in subsequent borrowings of the agencies directly concerned.

[2] U. S. Dept. of Commerce, Bureau of the Census, "State and Local Government Debt: 1941," Table 15.

revenues classed by the Bureau of the Census as "General Government Revenues" including public bridge tolls, and $1,156,592,000 of revenues classed as "Public-Service Enterprise Revenue"[1] including water supply, electric light and power, transit, gas, port facilities and airports.[2] These state and local revenues amounted to fully 20% of all revenues collected by the States and their agencies for their own purposes.[3] In the case of the class of special improvement districts like irrigation and drainage districts, these revenues other than taxes were 47.5% of all the revenues collected by the districts.[4] The five cities in the country with population over a million in 1941 received $381,809,000 of non-tax revenues including $305,990,000, "Public-Service Enterprise Revenue;" New York City's collections in the latter class were $164,198,000 and Los Angeles' were $48,520,000.[5]

Although the revenues from public service enterprises are an important support of the States' economy, their immunity is of no great potential consequence to the federal finances since they constituted only about 1.3% of the $94,500,000,000 total national income in 1941.[6]

If these charges were taxable by the Federal Government, the amount of the tax must be made up, if at all, directly or indirectly from property taxes otherwise available to pay general obligation bonds, with a consequent detrimental effect upon the City's credit. The City of New York has issued about $500,000,000 of general obligation

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[1] U. S. Dept. of Commerce, Bureau of the Census, "Financing Federal, State, and Local governments: 1941" Tables 2, 5.

[2] Bureau of the Census, "City Finances—1942," Table 42.

[3] The total revenues collected by state and local governments apart from fiscal aid from the federal government, amounted in 1941 to $11,370,079,000. See "Financing Federal, State, and Local governments: 1941," cited *supra*, Tables 2, 12.

[4] *Ibid.*

[5] Id. Table 41.

[6] Id. Table 32.

bonds for the construction of its water system. See *Brush v. Commissioner*, 300 U. S. 352 (1937). It has issued $300,000,000 of general obligation bonds for the unification of its transit system in addition to millions of dollars of bonds originally issued for the construction of the system. Although these obligations are technically general obligations, the City looks to water revenues and subway fares for the payment of the interest and amortization upon them. Even the general obligation bonds of the municipalities would be very poor risks indeed if their charges and revenues were to be subject to federal taxation.

It is no answer to say that the States and their municipalities can repair the damage by increasing the charges for their services or their taxes. In most cases that is not at all possible. In the case of municipalities, the only practical possibility for increasing revenues is to increase real property tax rates. The federal government has already pre-empted most of the available forms of new taxation, especially those forms which are progressive in character like the inheritance tax or the income tax.[1] Therefore the property tax has remained the principal source of local tax revenues through the history of local finance in America. At the present time it produces about 80.4% of all local revenues, and about 91.7% of all local tax revenues.[2] Yet it is notorious that the real property tax has practically reached its limit. All recent efforts have been to relieve the burden on real property, particularly in a time when it is so important to encourage a vast increase in new housing. The Court is familiar with the numerous tax strikes throughout the country in the 1930's. Increases in property tax rates in many municipalities have a tendency

[1] 87.4% of all revenues from these taxes in 1941 were collected by the federal government. Local governments, even including the District of Columbia, collected only about 1/10 of one per cent. of the total of such taxes. "Financing Federal, State, and Local Governments: 1941," *supra*, Table 7.

[2] *Ibid.*

to deter the improvement and further development of property, to cause a destruction of older buildings and businesses and a relocation of business and industry.

This Court has itself exploded the myth that there is an inexhaustible reservoir of taxation on which municipalities can draw to meet their obligations. In *Faitoute Iron and Steel Company* v. *Asbury Park*, 316 U. S. 502, 509 (1942), the Court said:

> "The notion that a city has unlimited taxing power is, of course, an illusion."

The law of diminishing returns operates strongly in the field of municipal finance. Increased taxation may mean less rather than more revenues for a city when it has passed the economic ability of many of its taxpayers to meet the tax levy. Delinquency then becomes a more and more serious problem. And with the increase in delinquency, those taxpayers who try to continue to meet their tax obligations must carry the burden of those who have dropped by the wayside. The result is a spiral which leads only to greater delinquency and less revenues and ultimately to bankruptcy.

That process has been demonstrated clearly enough even during a time when municipalities were *not* subject to federal taxation. A Federal Municipal Bankruptcy Act had to be enacted. It requires no imagination to see how infinitely worse would be the following picture if, in addition, the municipalities were saddled with a federal tax on their activities or their property, and particularly on their income:[1]

> "Cameron County Water Improvement District Number One is a public corporation created by the laws of Texas. It has issued bonds for the construc-

[1] Dissenting opinion of Justices CARDOZO, HUGHES, BRANDEIS and STONE in *Ashton v. Cameron County W. I. Dist.*, 298 U. S. 513, 532-4 (1936).

tion of a canal system, which bonds are outstanding in the amount of $802,000. Default has been suffered to the extent of $147,000, either for principal or for interest, upon its obligations now matured. But its own indebtedness is only a part of the financial burden that oppresses it. The bonded debt of other municipalities is a superior lien upon the property in the District for $10,386,000, and accumulated interest. The population is mainly agricultural. The farmers have been unable by reason of the great depression to make a living from their farms, and unable to pay their taxes in appreciable amounts. The District has made diligent effort to enforce collections, but without success. When it has attempted to foreclose its liens, it has been compelled for lack of bidders to buy the lands in and pay the court costs. After buying the lands in, it has been unable to get rid of them, for they have been subject to other tax liens prior to its own. The defaults are steadily mounting. For the year 1932, they were 63%; for the year 1933, 88.9%. The average market value of lands in the District does not exceed $75 per acre; and the total bonded debt per acre, principal and interest, is approximately $100. In these circumstances little good can come of levying more taxes to pyramid the existing structure. The remedies of bondholders are nominal, not real.

"What is true of Cameron County Water Improvement District Number One is true in essentials of thousands of other public corporations in widely scattered areas. The hearings by committees of the Congress before the passage of the statute exhibit in vivid fashion the breadth and depth of the mischief which the statute was designed to remedy. In January, 1934, 2019 municipalities, counties and other governmental units were known to be in default. On the list, which was incomplete, were large cities as well as tiny districts. Many regions were included: 41 out of 48 states. Students of government have estimated that on January 1, 1933, out of securities to the extent of $14,000,000,000 issued by units smaller than the states, a billion were in default. The plight of the debtors was bad enough;

> that of the creditors was even worse. It is possible that in some instances the bonds did not charge the municipalities or other units with personal liability. Even when they did, however, execution could not issue against the property of the debtor held for public uses, and few of the debtors were the owners of anything else. In such circumstances the only remedy was a mandamus whereby the debtor was commanded to tax and tax again. *Rees* v. *Watertown*, 19 Wall. 107, 22 L. ed. 72; *Meriwether* v. *Garrett*, 102 U. S. 472, 501, 26 L. ed. 197, 200. The command was mere futility when tax values were exhausted."

This conclusion was in the minority opinion in the *Ashton* case, but it soon reappeared in the majority opinion in *United States* v. *Bekins*, 304 U. S. 27, 48 (1938). The Court there adopted the language of a California statute, declaring:[1]

> "There exist throughout the State of California economic conditions which make it impossible for property owners to pay their taxes and special assessments levied upon real or taxable property. The burden of such taxes and special assessments is so onerous in amount that great delinquencies have occurred in the collection thereof and seriously affect the ability of taxing districts to obtain the revenue necessary to conduct governmental functions and to pay obligations represented by bonds. It is essential that financial relief, as set forth in this act, be immediately afforded to such taxing districts in order to avoid serious impairment of their taxing systems, with consequent crippling of the local governmental functions of the State."

After quoting this language of the California Legislature, the Court said (304 U. S. 27, 48):

> "While the facts thus stated related to conditions in California, similar conditions existed in other parts of the country and it was this serious situation which led the Congress to enact Chapter IX and later X."

[1] Laws of California, 1934 ex sess., Chap. 4.

Elsewhere in the opinion, the Court said (304 U. S. 27, 53):

> "Improvement districts, such as the petitioner, were in distress. Economic disaster had made it impossible for them to meet their obligations. As the owners of property within the boundaries of the district could not pay adequate assessments, the power of taxation was useless."

The simple fact is that the evolution of state, municipal and federal finance in this country has placed the municipalities in a position where they could not stand the burden of federal taxation. The ability of the States and localities to meet all the needs of their people has been strained to the utmost in recent years. As the record of the depression of the 1930's showed, in many parts of the country, there was a complete breakdown. The shoe, however, was once on the other foot; toward the end of the 19th century it was the federal government which found itself faced with inadequate sources of revenue in order to meet its increasing obligations in the federal sphere. The attempt to meet that situation was made in the Income Tax Act of 1890, which was, however, stricken down by the Supreme Court in *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601 (1895). When the situation was no longer tolerable, the States were asked to ratify the Sixteenth Amendment to the Constitution permitting the federal government to enact effective income tax laws. The needs of the federal government were recognized by the States at that time, and the federal government has never again been lacking in the means to meet its every financial need. The States submit that now, when local government is so close to the limit of its ability to raise revenues to provide for the public welfare, the federal government should not be permitted to increase the burdens of the States.

The effects of impairing municipal credit do not stop with the municipalities themselves. If this case or any other case even suggested that the federal government has

power to tax state and municipal incomes, the values of their outstanding securities would be sharply depressed. Yet these securities are largely held in public sinking funds, by banks and insurance companies and by federal agencies like the Reconstruction Finance Corporation.[1] These are institutions in which the public has a great stake.

In considering the social aspects of a reversal of precedent in this field, it should not be forgotten that of the tax monies paid by persons in the lower income levels, by far the greater part is paid to local government, particularly to municipal government. Under 1946 income tax rates the normal family of four with an income of about $2200 will pay no income tax whatever. The federal government collects very little in taxes from this family: merely taxes on admissions to moving pictures, on cigarettes, and on an occasional purchase of small luxuries. Even the Social Security Tax, although only one per cent, is considered a form of insurance. But this same family, if it owns its own home with a value of about $5000, will pay local real estate taxes of about $150 to $200 a year (plus charges for water and perhaps gas or electricity furnished by the city). The fact is that progressive income and inheritance taxes have been largely pre-empted by the federal government. This leaves municipal government supported more than any other by low incomes and it leaves the low income earner supporting municipal government more than any other government. A change in constitutional law which transfers millions of dollars annually from municipal treasuries to the federal treasury must be regressive in its result, bearing down most heavily on those least able to afford it.

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[1] In 1942 at least 60% of all state and local obligations were held by owners other than private individuals and commercial corporations. Government funds owned 25.1% of all outstanding; banks owned 20.3%; insurance companies 10.8%; and tax-exempt institutions other than mutual savings banks held 3.1%. Annual Report of the Secretary of the Treasury, for fiscal year ending June 30, 1942, Table 100.

The economic inability of municipalities to finance much needed regional improvements out of tax revenues was an important element in the development of revenue financing of public works. Another reason was the conviction that many public improvements do not benefit all taxpayers equally, some receiving benefits from a public project and some none at all. It was only equitable to accommodate the charge for the service to the benefit derived. The result was to pay for the cost of the improvement out of charges against the actual users of the facility instead of against taxpayers generally. This form of government financing has done much to relieve the hardships caused by the inelasticity of the local fiscal systems; it has produced vast public improvements which could not have been provided on any other basis. Annual revenues from projects of this sort increased 122.5% from $519,807,000 in 1932 to $1,156,592,000 in 1941.[1]

Federal taxation of the income of such facilities would not only be interference; it would be complete destruction. They are financed out of the proceeds of bonds payable primarily from the revenues of the project yet to be built. The investor, and not the public provides the initial capital. He will not do so unless he is convinced that the revenues of the project are likely to cover all operating costs, all interest costs, the cost of amortizing the debt over a reasonable period of time, and a margin of coverage to allow for possible errors in calculation and for periods of economic depression.

All state and municipal revenue bonds are issued on the basis of immunity of the public income from federal income taxes. They make no provision for the payment of such taxes. Their debt service requirements are calculated carefully at the time of inception of the project to absorb practically all their surplus revenues over operating costs with

[1] "Financing Federal, State, and Local Governments: 1941," *supra*, Table 12.

only sufficient margin to meet the requirements of investors. Since their purpose is to pay off the debt as soon as possible to provide free or low cost public service, the schedule of debt retirement is naturally accelerated as far as possible commensurate with the anticipated income over operating expenses only. If they must pay federal income taxes on their surplus revenues before deduction of debt retirement expenditures, they could not possibly meet their debt service requirements.

Not only would this mean the bankruptcy of such projects as have already been built on a self-supporting basis, but it would put an end to this method of state financing. Investors are not likely to advance their money to such undertakings if the margin of safety is drastically reduced by the annual payment of federal income taxes out of revenues which otherwise would be available for debt retirement. They will require, instead, general obligations supported by a pledge of the state or municipal taxing power. This is particularly so because the financing of these public improvements is so often of a marginal nature.

7. Effect of Reversal of Precedent on the Federal Government.

Indeed, the rule which would permit "non-discriminatory" taxation of government agencies would have violent repercussions on the federal government. The doctrine that all constitutional federal activities are governmental and therefore immune, has protected the federal government from taxation by the States. *Pittman* v. *Home Owners' Loan Corporation*, 308 U. S. 21 (1939); *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95 (1941). But if even governmental functions are to be subject to non-discriminatory taxes, the federal government must prepare to pay real estate taxes at regular non-discriminatory rates on every federal post office, arsenal, court house, or office building; to pay regular non-discriminatory record-

ing taxes on every federal deed or mortgage, issuance taxes on federal bonds, sales taxes on federal purchases and income taxes on the surpluses produced by government agencies. (*Cf.* dissenting opinion in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 178-180.)

The total annual federal revenue from such federal credit corporation and public service enterprises in 1941 according to the Bureau of the Census was $1,491,346,000, derived from the following federal agencies or projects:[1] "Alaska Railroad, Alley Dwelling Authority, Banks for Cooperatives, Boulder Dam (power and water), Commodity Credit Corporation, Defense Housing, Disaster Loan Corporation, Electric Home and Farm Authority, Export-Import Banks, Federal Crop Insurance Corporation, Federal Farm Mortgage Corporation, Federal Housing Administration, Federal Intermediate Credit Banks, Federal National Mortgage Association, Home Owners' Loan Corporation, Panama Canal, Post Office Department, Production Credit Corporation, Public Works Administration (in respect to power and other utilities), Reclamation Bureau (in respect to power aspects), Reconstruction Finance Corporation, R. F. C. Mortgage Company, Regional Agricultural Credit Corporation, Rural Electrification Administration, U. S. Housing Authority, Tennessee Valley Authority (in respect to current power operations)." In addition the Bureau of the Census reports $463,697,000 of other federal non-tax revenues in 1941.[2]

We have submitted in this Point that the federal system is worth preserving and that the destruction of the States would be a calamity.

We have shown, even considering the question *de novo* without reliance on precedent at all, that the detructive

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[1] "Financing Federal, State, and Local Governments," *supra*, Table 11.

[2] Id., Table 2.

impact of federal taxation of the States would be real and actual. It would operate through the power of selective and conditioned exemption to substitute federal policy for local policy in matters of purely local concern.

It would operate to destroy local government by curtailing its ability to afford essential services and at the same time compelling it to shoulder a great federal tax burden. These are arguments which lead to the conclusion that the federal government does not have and should not have constitutional power to tax the States whenever they are engaged in the performance of public activities essential for the best interests of their people.

Certainly the disastrous consequences of taxing the activities which the States and Cities have been carrying on up to the present time are such as to place that proposal in the category of constitutional revision rather than constitutional interpretation. The fact is that the States and municipalities could not accommodate their finances to federal taxation of their income from their water supply, highways, bridges, hospitals, piers, municipal power plants, terminals, irrigation systems, traction systems, drainage developments, sewers, and all the other activities they have already undertaken on a revenue basis in answer to public need. Certainly these activities must continue immune from federal taxation even though non-discriminatory.

POINT II

An examination of the rule which permits federal taxation of the States only when actually necessary to preserve the existence of the Union.

The problem of intergovernmental taxation arises from the dual nature of our government and from the premise implicit in the Constitution that both the state governments and the national government are vital to the public welfare.

In passing it may be stated that the validity of this premise is not open to debate.[1] Local self-government—the right of the people of a State to decide all matters of state concern and the right of the people of a city or other locality to decide all questions of local concern—is obviously of the essence of any liberal and democratic system of government. If this premise is invalid then the time has come to call a general constitutional convention to recast the entire system of government.

The premise from which to start is therefore that both the States and the Union must be preserved. As applied to intergovernmental taxation this raises two questions:

(a) How far *must* the federal government actually go in taxing the state governments in order to preserve its own existence.

(b) Similarly, how far *must* the state governments actually go in taxing the federal government in order to preserve their own existence.

It will be noted that the first of these two questions differs fundamentally from the question which is sometimes raised as to how far the federal government could go in taxing the States without destroying them. Apparently this last question springs from Judge MARSHALL's dictum that the power to tax involves the power to destroy, and through some mistaken chain of reasoning, from the conclusion that anything short of total destruction is constitutional.

The two questions posed above are, however, more in accord with public policy as well as with constitutional principles. They recognize, as does the Constitution itself, that local self-government is of the essence in any liberal and democratic system, and they also recognize the fact

[1] See *supra*, pp. 14-19.

that it is equally essential to have a strong and vigorous national government to cope with foreign affairs and with those internal affairs where uniformity throughout the nation is necessary.

The mere statement of these questions is sufficient to provide their answer. Bearing in mind that vast reservoir of private property,[1] activities and income[2] which is subject to the taxing power of both the States and the Nation, no argument is necessary to demonstrate that there is no actual necessity for either to tax the other in order to raise sufficient revenue to carry on its affairs, nor, as a practical matter, is there any real likelihood that such a situation will ever materialize. As pointed out elsewhere in this brief, the federal government has raised enormous revenues during the war years—many times the amount that some fiscal experts thought possible—without collecting any material amounts from the States. From the standpoint of the necessity of preserving the federal government, no taxation of any state activity, property or income is now justified or is ever likely to be justified.

1. Advantages of the Rule: Expediency, Soundness and Reciprocity.

The rule above derived from the Constitution is that federal power to tax the states (and state power to tax the federal government) exists only if and when all private sources of tax revenue are exhausted and definite proof is made that intergovernmental taxation is actually necessary to provide sufficient revenues to carry on the affairs of the taxing government,—a situation which as a practical matter we believe will never arise. This rule has the additional

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[1] The assessed valuation of property subject to taxation for State or local purposes in 1940 was $144,636,317,000. "Property Taxation: 1941," *supra*, Table 11.

[2] The national income in 1941 was $94,500,000,000. "Financing Federal, State, and Local Governments: 1941," *supra*, Table 37.

virtues of practicability and expediency. It avoids all those distressing and unsatisfactory attempts to classify state activities between the immune and the taxable; it is a rule which will forever rid this Court of the plague of immunity cases like the instant case. It has the great advantage of freeing this Court from any duty to inquire into the motives of the State Legislatures. It meets the objections raised in Point I. It avoids the repugnance between taxation and the sovereignty of the government taxed. It eliminates the possibility of taxation as an instrumentality of destruction through control, and taxation to prevent the States from exercising the full measure of their sovereign powers. And it satisfies the fundamental point that special privilege for the federal government as against the States is inconsistent with a truly federal system.

Reciprocity and equality were the uniform policy of this Court from the beginning. If the dictum in *Helvering* v. *Gerhardt*, 304 U. S. 405, 412 (1938), implies abandonment of that constitutional rule, it is not justified by the paragraph from *M'Culloch* v. *Maryland*, 4 Wheat. 316, 435, 436 (1819), cited in the *Gerhardt* opinion. The next paragraph in Chief Justice MARSHALL's opinion, which was not quoted in the *Gerhardt* case, supplies the answer.

On the argument the State of Maryland had assumed that state banks might be taxed by the federal government. Since the taxing powers of both the States and the Nation are concurrent, the State therefore contended that it might likewise tax the bank of the United States.

Pinckney, arguing for the bank's immunity, gave two alternative answers:[1] first he argued that the federal and state governments were essentially different, implying that the federal government might well be immune from state taxation, even should state instrumentalities be taxable by

[1] 4 Wheat. 316 (1819).

the federal government. But then he argued alternatively that the State of Maryland was wrong in assuming that the federal government had the power to tax the state banks. True, the state and national taxing powers were concurrent, he said. But that did not mean that the bank of the United States was taxable, he concluded. *It might prove rather that the state banks were immune.*

Chief Justice MARSHALL *accepted his reasoning in toto* and, at the close of his opinion, he rejected the State's argument on this point. Its assumption was wrong: the concurrence of the taxing power did not prove reciprocal taxation, he explained; *but it might prove reciprocal immunity.*

His language is:[1]

> "But if the full application of this argument could be admitted, *it might bring to question the right of Congress to tax the state banks,* and could not prove the right of the states to tax the Bank of the United States."

Chief Justice MARSHALL's alternative suggestion of reciprocal state immunity could not be tested until the federal government adopted the internal revenue act of 1864. From that time on reciprocity and equality were always supported by this Court. The rule has always been: "That immunity is implied from the nature of our federal system and the relationship within it of State and national governments, and is equally a restriction on taxation by either of the instrumentalities on the other." *United States* v. *California*, 297 U. S. 175, 184 (1936). A few of the other many expressions of the reciprocity and equality of the immunity are found in *Ambrosini* v. *United States*, 187 U. S. 1, 7 (1902); *Metcalf* v. *Mitchell*, 269 U. S. 514, 522 (1926); *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, 575 (1931).

[1] 4 Wheat. 316, 436; Italics supplied.

It is difficult to see any sound reason to depart from this rule at this time when the necessity of the change is not pressing and the result is merely to subordinate the state government to the federal government.

2. The Fallacy of Curtailing State Immunity to Enhance Federal Revenues.

We have searched the cases to find what the practical objection is to complete immunity of state activities. We have found only one practical objection stated: that the complete immunity of all activities within the power of the States might jeopardize the existence of the federal government by eliminating revenues which might otherwise be collected. The rule suggested above fully meets this objection.

Furthermore, the almost limitless ability and resources of the federal government in raising revenues, as those abilities and resources have been demonstrated through the past ten years, effectively dissipates the notion that any forseeable activities of the States can seriously impair the ability of Congress to raise adequate revenues.

a. Incidental Deprivation of Revenue Is Not Decisive.

The argument for the limitation of state immunity to keep federal revenues intact is nothing but the old argument against an economic burden. It has been discarded in the field of derivative immunity. The case of *Graves* v. *Texas Co.*, 298 U. S. 393 (1936) decided an immunity question on the basis of cost burdens. *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941) rejected that doctrine. If neither the States nor the federal government can any longer claim immunity merely because the tax costs them money, it is difficult to see why the federal government should still be permitted to tax the sovereign States merely because not to do so would cost the federal government money.

The latest cases involving intergovernmental immunity reject any qualification of federal immunity.[1] The result in those cases was foreshadowed by *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937). And those latest federal immunity cases, in turn, foreshadow the abandonment of the classifications stemming from *South Carolina* v. *United States*, 199 U. S. 437 (1905), which have no better basis than the same "cost" argument.

b. *The Offset Against Federal Revenue "Losses."*

Even if this Court had never wavered from the economic cost test of immunity, the objection to state immunity which talks about the necessity of preserving federal revenue sources would still be completely untenable. Its most glaring fault is that it looks at only one side of the balance sheet. No effort has ever been made, in discussing federal revenue losses through state immunity, to consider how much the States' activities have increased federal revenues by improving the prosperity and income of the people of the States from whom the federal government derives its revenue.

Certainly the tax potential of the federal government is a mathematical function of the welfare and prosperity of the people of the Cities and States of America. The sole purpose of the functions and activities of the States is to promote that welfare, health and prosperity. American prosperity and the national credit of the federal government is testimony to the fact that the States and Cities have played their full contributing part to the national economy. The people of a municipality elect to distribute their own water, to operate their local transit facilities, or to take over their local gas plant because of the people's conviction that in public hands service can be improved,

[1] *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21 (1939); *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95 (1941); *City of Cleveland* v. *United States*, 323 U. S. 329 (1945).

rates can be reduced and the facilities can make a greater contribution to the welfare and prosperity of the people of the locality. When those public objectives are attained, the federal government gains much more, tax-wise, than it may theoretically lose through the loss of taxation of the private company which may formerly have operated the water works, the transit system, or the gas plant.

Chairman Lilienthal of the Tennessee Valley Authority recently reported that the activities of that agency have increased the per capita income payments in Tennessee from $190 a year in 1933 to $317 a year in 1940 and finally to $764 in 1944. The increase was 67% to 1940 and 302% to 1944. That this was attributable to the federal determination to enter the utility field in the Tennessee Valley appears from comparison with equivalent figures for the United States as a whole. The country-wide per capita income payments increased only 204% from 1933 to 1944, as compared with 302% for Tennessee alone. This great gain in the local tax base must be offset against the loss of taxes by the federal government's acquisition of the Tennessee Electric Power Company in 1939.

Obvious benefits have accrued to the federal income tax revenues as a result of the increase in business and the prosperity of the New York metropolitan region brought about through the construction by New Jersey and New York of the great bridges and tunnels crossing the Hudson River and linking New York with the great industrial region of Northern New Jersey.[1]

In 1927, before New York and New Jersey completed the Holland Tunnel under the Hudson River, trans-Hudson traffic amounted only to 2,500,000 vehicles a year. Today, trans-Hudson traffic through the Holland Tunnel, Lincoln Tunnel and across the George Washington Bridge has risen to approximately 30,000,000 vehicles per year.

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[1] See *Commissioner v. Estate of Shamberg*, 144 F. (2d) 998 (1944), cert. den. 89 L. ed. Adv. Ops. 282 (1945).

In other words, the new inter-state highways under and over the river largely created their own traffic and provided a great stimulus to the commerce of the Port of New York District. Many additional millions of dollars of federal gasoline tax were collected by the federal government because of these new state facilities. Millions of dollars of additional income tax were collected by the federal government because of the tremendous savings effected by businesses using these highways; they have lowered the average toll paid by businesses crossing the Hudson, they have eliminated wasteful congestion which made many man-hours of work completely unproductive, they have effected a great saving in the time and costs necessary to cross the river; they have created a great new suburban bus industry; they have been directly responsible for much new suburban home building; they have, in short, greatly increased the prosperity and income level of business and persons in the New York and New Jersey and increased the wealth of a great number of federal taxpayers.

Most new state services produce the same result. A better regulated liquor dispensing system in Ohio may have well produced a healthier and more prosperous community which paid more federal income taxes because of the State's activity. This may well have increased federal revenues more than state immunity would have decreased them. The Bank of North Dakcta, established by constitutional amendment, has done much which could not have been done by private institutions, to promote the general prosperity of the people of that State.

The wealth of the largest city in the country, from which the federal government draws a large share of its tax revenues, would not be possible if it were not for the municipal transit system upon which the City has spent over $1,300,000,000. The City could not have grown in size and in wealth if rapid transit had not been provided to

connect its business heart with its far-flung residential areas. The City built the entire system itself. For years portions of it were operated under leases with private operators, but the people ultimately felt that the service thus provided was inadequate. Pursuant to a popular referendum, the City ultimately took over the entire operation itself.

As examples multiply, it becomes absurd to talk of the losses of federal revenue from state activities. The loss is certainly not a net loss. The Erie Canal created wealth in the middle-west and in New York, which has never ceased to profit the federal government in tax sources. The Department of Water and Power of Los Angeles has provided the water and power which made possible a great new metropolis, whose wealth has never been a source of regret to the federal tax collector.

The construction of public projects by the States has also provided employment on a large scale and thus, in times of economic stress has helped to relieve the burden of the federal government in caring for the unemployed. Taxation of the States which would limit their ability to continue construction of such projects would cast a far heavier burden on the federal government in the necessity of caring for the unemployed than the federal government would lose because of the immunity of the States in undertaking their activities.

c. *The Groundless Fear of State Expansion and Socialism.*

Possible loss of federal tax revenue as an objection to state immunity was first voiced in *South Carolina* v. *United States*, 199 U. S. 437 (1905). It ignored the broader considerations of public policy, public welfare and public prosperity pointed out above. But what is more, it was based upon three fears which the passage of forty years have absolutely dissipated.

These were fear of an enormous expansion in state activities which had previously yielded federal revenue, fear of socialism and fear that the federal government would not be able to survive the anticipated expansion by the States.

The expansion of state activities into new fields has not been great. The States have provided public services in cases which were financially marginal but where the public need existed and private capital was not capable of filling it. Of course, in these cases, if the State did not act, the services would not exist at all so that there is no real loss of federal revenue because of the State's immunity. Another class of case involves certain natural monopolies like water, power and traction. The States and municipalities generally come into these fields when the service provided by private persons prove inadequate. See *Brush v. Commissioner*, 300 U. S. 352, 360 (1937). In other words, it is rarely a choice between State operation and private operation. In most cases it is rather a choice between State services and no service. The liquor business in South Carolina in 1905 may itself be an example. Apparently the private liquor traffic had resulted in so many evils that the people would no longer tolerate it. Had not the State substituted the dispensary system, the people might well have considered complete prohibition the only alternative. In that case the federal government would have lost no more revenues than if the State's immunity had not been restricted.

The results of the Public Utility Holding Company Act of 1935 gave an excellent example of the baselessness of the fear that there was a movement toward public ownership of utilities to an extent that could in any real degree jeopardize federal revenue bases. (See *South Carolina v. United States*, 199 U. S. 437, 454 (1905).)

The "death sentence" provision of the Act has compelled many public utility holding companies in the past few

years to dispose of their local operating properties. Some persons, perhaps because they disagree with the purpose of the Act, or perhaps out of dislike of public ownership, have complained that the federal legislation combined with the States' tax immunity was resulting in a widespread movement toward public acquisition of private power plants. Yet, as this brief is written, Chairman Ganson Purcell of the Securities and Exchange Commission, has testified before the Subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives that this is absolutely not so. He testified that of all the local public utility operating properties that have been sold as a result of the Federal Act, about $4,053,719,000 worth were sold to private interests and only about $293,500,274 worth was purchased by government agencies; and of that latter figure the federal government itself acquired almost half represented by sales to the federal Tennessee Valley Authority.

The fact of the matter is that the movement toward state and municipal ownership has never reached the alarming proportion and the variety of fields which was feared in 1905. It has never extended to "tobacco, oleomargarine and all other objects of internal revenue tax." *South Carolina* v. *United States*, 199 U. S. 437, 451 (1905). As a matter of fact, the extension of activities by the federal government has far outstripped any corresponding extension by the States. And yet the incidental loss of local tax sources was not considered an objection to complete federal immunity in *Pittman* v. *Home Owners' Loan Corporation*, 308 U. S. 21 (1939) or in *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95 (1941).

Fear of socialism was obviously another great reason for the limitation of state immunity in 1905. The Court in the *South Carolina* case expressly stated that that was one of the impelling reasons for the decision (199 U. S. 437, 454, 455). It would seem utterly unnecessary for us to

enter here into a discussion of how unfounded was that fear in the light of the history and development of our States over the past forty years. We should observe, however, that the confusion in this constitutional field over the past forty years might very well be traced to this introduction of these considerations of political philosophy into the field of intergovernmental taxation. The perversion of the federal taxing power to an instrument for curbing the political tendencies of the States could only have resulted in judicial confusion.

d. The Impregnable Position of Federal Finances.

If in 1905 there was any justification for a fear that state immunity might impair federal revenues to any substantial degree, it was certainly ended by the 16th Amendment which permitted effective federal income taxation beginning in 1913. The history of federal finances in the past four years contains the decisive answer. The colossal increase in federal revenues to meet the greatest fiscal emergency of all times hardly squares with the picture of a weak and decrepit federal government being starved to death by a crippling loss of revenues because of state immunity. Any government with the demonstrated capacity of our federal government to multiply its revenue over and over again, hardly fits the picture painted by the fears of 1905. Federal tax revenues jumped from $1,891,290,000 in 1932 to $7,818,365,000 in 1941.[1] By 1945 it had reached the staggering total of $46,456,554,000.[2]

The fact of the matter is that the federal government has never collected an income tax on state revenues. It has never collected a property tax on state property. It has never relied upon the States as a substantial source of

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[1] "Financing Federal, State, and Local Governments; 1941," *supra*, Table 9.

[2] Fiscal year ending June 30, 1945. See Daily Statement of the Treasury Department, June 30, 1945.

tax revenue. The activities of the States have not imperiled the ability of the federal government to raise adequate revenue. Whatever activities the States are actually likely to go into in the future will do as little harm to the stability of the federal government as have their activities in the past.

There was much more substance to the fear of loss of federal revenues when derivative immunity was more freely allowed. Now that the claims for immunity by state and municipal employees, contractors and lessees have been finally rejected (see *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939)) the loss to the federal government from state immunity is only a fraction of what it would have been in previous years.

There is no inherent vice in the fact that state or federal activities may cut down the corresponding federal and state tax sources. That happens every time the federal government buys real estate to erect a postoffice or a federal power development, or river front property for the operation of federal barges in commercial service on the Ohio or Mississippi. Here the loss of real estate taxes to the locality is immediate and measurable. Presumably, however, the community or the region derives more public benefit and the enhancement to the public welfare and prosperity far out-weighs the measurable real estate tax losses. The same principle operates where in order to construct a reservoir or a dam or a toll highway, the state government buys property theretofore devoted to income producing uses in private hands. It is difficult to conceive that a different principle applies where the people of a State or locality, in the interest of the local welfare and prosperity, take over a privately owned water system or toll bridge or gas plant. For reasons which we have hereinbefore stated, we believe that by the enhancement of the general health, welfare and prosperity of the locality, the strength and resources of the federal government are immeasurably increased.

The States can, by the exercise of their regulatory power, substantially reduce federal tax revenues in many ways. Prohibition of intoxicating liquor would as effectively have eliminated federal revenues from the liquor traffic in South Carolina as state immunity would have done. A State may regulate rates charged by public utilities and thus lessen their income and the income tax they will pay the federal government. A State may fix the hours of closing places of amusement and thus curtail the federal receipts from its cabaret tax. A State may prohibit moving pictures on Sunday and thus curtail receipts from the federal admissions tax. The loss of federal revenue has never been urged as a reason for curtailing the state power to regulate. It is no better reason for curtailing state immunity.

Any actual danger that state immunity will seriously injure the federal government by withdrawing federal revenue sources is non-existent. Such an incidental loss of money has ceased to be an objection to immunity, and is more than offset in dollars and cents by the federal tax gain from the prosperity created by state activities. Above all, the real danger to the balance of the federal system and the survival of the States which would arise from taxation of the States is too serious to be outweighed by the flimsy argument against "withdrawal."

The only constitutional interpretation consistent with our federal system is one which would permit federal taxation of the States only if and to the extent such taxation is actually (and not hypothetically) necessary to preserve the federal government from destruction due to proven inability to raise necessary revenues because of the immunity of state activities. The axiom of constitutional law that both the States and the Union must be preserved intends the preservation of the States as fully effective entities for the promotion of the public welfare. It is wholly inconsistent with a conclusion that the federal government may tax the

States so long as some undefined remnant of state government is not destroyed. Upon this basis there is no scope for limitation of state immunity at the present time or under any future conditions which can possibly be expected to materialize. The States are not taking over all private business, and the federal government without the necessity of taxing the States, will still remain financially the strongest government in the world. We need not speculate on the fantasy of a decrepit federal government and overreaching States. Yet only such fantasy justifies a limitation on state immunity.

POINT III

An examination of the rule holding that "governmental" activities undertaken by the States are immune from federal taxation.

It has already been demonstrated that to subject the States generally to federal taxation even though technically "non-discriminatory," would be incompatible with constitutional principles and sound public policy. We have also discussed the extent of the limitation upon state immunity which is required by the necessity of protecting the continued effectiveness of the federal government. There remains for discussion, however, the distinction sought to be made in many opinions between "governmental" and "non-governmental" activities. An analysis and careful consideration of this attempted distinction makes three points clear:

First, that any rule which seeks to limit state immunity to the specific methods used by the States in meeting public needs, in 1789 ignores the fundamental necessity of adapting governmental procedures, practices and activities to changing circumstances and would reduce the States to primitive

colonial governments incapable of meeting modern social and economic conditions.

Second, that any rule which seeks to restrict state immunity to "normal," "customary" or "usual" activities, meets with the insuperable difficulty which this Court has already encountered, that if the terms are taken overliterally it is impossible as a practical matter to determine what they mean.

Third, that any rule which would seek to confine the States' immunity to "essential" governmental activities, if the phrase is taken over-literally, involves the fallacy that there is some irreducible minimum of state activities, which constitute the soul or essence of state government and that all else is surplusage.

In truth, the real difficulty seems to be with the word "activity." If the word means a specific operation—driving a horse as contrasted with driving an automobile—then the difficulties indicated above exist. In 1789 the States engaged in the promotion of public welfare, but the particular methods and procedures by which they did so were those of a century and a half ago. If, however, the word "activity" refers to the end rather than the means—if it is the promotion of the public health and all steps taken to that end which constitute an "activity,"—if the operation of an X-ray machine and of a fluoroscope are not deemed separate activities—then no difficulty is encountered.

If state immunity is to be tested by the nature of the state activity, then as will appear, the only practical and workable rule is that those activities undertaken by the State for the purpose of promoting the public welfare, health and safety are *per se* "essentially governmental" in the true sense of the term and immune from taxation, together with the property used in such activities and any income incidentally derived therefrom.

1. The True Nature of the Various "Governmental" Function Tests.

Some of the cases suggest that there may be a difference between a "governmental" activity and a "business," "commercial" or "non-governmental" activity. *South Carolina* v. *United States*, 199 U. S. 437, 461 (1905); *Flint* v. *Stone Tracy*, 220 U. S. 107, 157 (1911); *Ohio* v. *Helvering*, 292 U. S. 360 (1934); *Helvering* v. *Powers*, 293 U. S. 214 (1934); *Allen* v. *Regents*, 304 U. S. 439 (1938). Here the idea seems to be that some things which a government does are "governmental" and other things are not.

Elsewhere in the opinions the approach is in terms of what we may call "grades of governmentality." Here we have the many adjectival tests which seek to determine whether an activity is a "strictly governmental function,"[1] an "ordinary governmental function,"[2] an "essential governmental function,"[3] a "necessary governmental function,"[4] a "usual governmental function"[5] and a "traditional governmental function."[6]

Each of the two possible approaches will color the answer. Thus, the group of tests which talk of "ordinary," "traditional" and "usual" governmental functions, have been discussed from two points of view. *United States* v. *California*, 297 U. S. 171 (1936), concedes immunity "to the activities in which the states have traditionally en-

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[1] *United States* v. *Baltimore & Ohio R. R. Co.*, 17 Wall. 322, 329 (1873); *South Carolina* v. *United States*, 199 U. S. 437, 461 (1905); *Ambrosini* v. *United States*, 187 U. S. 17 (1902); *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 157 (1911).

[2] *United States* v. *Baltimore & Ohio R. R. Co.*, 17 Wall. 322, 329 (1873); *South Carolina* v. *United States*, 199 U. S. 437, 451, 459 (1905).

[3] *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 157 (1911).

[4] *Metcalf* v. *Mitchell*, 269 U. S. 514, 522 (1926).

[5] *Helvering* v. *Powers*, 293 U. S. 214 (1934).

[6] *United States* v. *California*, 297 U. S. 175, 184 (1936).

gaged." But *South Carolina* v. *United States*, 199 U. S. 437, 458 (1905), would withhold immunity from an activity "which ordinarily is carried on by individuals." Yet there are dozens of activities which in one sense are both "traditionally governmental" and also "ordinarily carried on by individuals." The parallel is clear between the Federal Land Banks or The Bank of North Dakota and private banks, the United States Employment Service and private employment agencies, the Nevada Industrial Commission administering workmen's compensation insurance and the Aetna Casualty Insurance Company, the Los Angeles Department of Water and the Hackensack, New Jersey, Water Company, the United States Post Office and the Railway Express Agency, the Detroit Street Railway System and the Philadelphia Rapid Transit Co., The Golden Gate Bridge and a private toll bridge, the Springfield Arsenal and the United States Steel Company.

Here again we are driven to the only possible distinction:—the objective of the government on the one hand and the private company on the other. Thus it is fair to say that it is a "traditional," "usual," and "normal" function of government to provide whatever services are necessary to promote the public welfare, health and safety, but that it is *not* a traditional objective of private business.

In this way we are spared in the case of the States, as we are in the case of the federal government, the necessity of trying to work out a logical system of categories. We are spared the necessity of trying to decide whether the construction of a state capitol is a "usual governmental function" or is simply the "ordinary business" of building construction. We are spared the necessity of trying to decide whether vehicular tunnels are "ordinary governmental activities," because governments have traditionally built bridges, although tunnels are a relatively new engineering technique. We are spared the necessity of making a host of aggravating distinctions, which, we have shown, have

no relation to the preservation of the federal and the state governments.

We are particularly spared the problem of deciding how many years it takes to make a tradition, what percentage of government participation in a field makes it a "usual governmental function," and whether a function becomes "usual" as time goes by and the percentage increases. We are not troubled with the question whether some earlier time in history should be chosen rather than our own as a vantage point from which to decide what are "traditional" and "usual" governmental activities. And we are spared the problem of "individual philosophies" in deciding, apart from the decision of the people of the States, just which activities are "essential" and which may be dispensed with.

We are forced to conclude, like the Court before us in *Brush* v. *Commissioner*, 300 U. S. 352, 361 (1937), that these adjectives do not constitute a rule because they are not "used as an exclusive or rigid delimitation." Each of them is capable of a wide range of interpretations from the narrow to the broad. After studying all of them, we are drawn to the conclusion that none of them is inconsistent with the rule which we have advocated; in their true sense each leads to the same conclusion, that immunity is at least co-extensive with activities undertaken by the State with the primary motive of improving the public health, safety and welfare.

The judicial attempts to distinguish between "governmental" activities on the one hand and "business" or "commercial" or "non-governmental" activities on the other, have not been successful. To the Court of the *South Carolina* case, supplying potable water was an ordinary business operation;[1] to the Court of the *Brush* case, it was an "essential governmental function."[2] We know no

[1] 199 U. S. 437, 451 (1905).
[2] 300 U. S. 352 (1937).

touchstone which distinguishes the sheep from the goats in this field. One dictionary definition of a "business" is "any particular occupation or employment habitually engaged in especially for livelihood or gain." "Commercial" is defined as "having financial profit as a primary aim."

These dictionary definitions loosely fit the popular use of the words; they seem to fit the thinking underlying the Court's decision in the *South Carolina* case. In a democracy people do not think of the activities undertaken by their governments for the primary purpose of promoting their welfare, as "business" or "commercial." They do not think of the postoffice as a "business," but they do think of the American Railway Express in those terms. They don't think of the Bronx Zoological Park as "commercial," but they do class the Barnum and Bailey Circus in that category. The Home Owners Loan Corporation or The Bank of North Dakota is not popularly considered a business activity, but the corner bank is. We do not consider the Nevada Industrial Commission which furnishes workmen's compensation insurance as a business operation, but even a mutual life insurance company is considered just that. The United States Employment Service and the corresponding state services are not "businesses" in popular thinking, but a private employment agency is considered "commercial."

The only possible reconciliation of these attitudes has already been pointed out:—it is the difference in objective between the public and the private operation. If the public operation is undertaken to provide a service which the State or the federal government considers necessary, it cannot be considered a "business" in the popular sense of that term. Government is the antithesis of business in the sense that government seeks to provide services and it makes charges only as an incident thereto, while business provides services only as an incident to making profits.

It seems as fruitless to attempt to classify various degrees of "governmental function" as to distinguish between "governmental functions" and "business" or "commercial" activities, except in terms of the objective of the government providing the service. The various adjectival tests seem to form into groups. One group talks in terms of "ordinary," "customary," "traditional," "usual" "governmental functions." The aim here apparently is to protect the federal government from what was once feared would be a loss of revenue sources. The other group talks in terms of "strictly," "essential," "indispensable" "governmental functions" and apparently conceives that there is some irreducible minimum which constitutes the essence of state government and that all else is surplusage.

This is the choice of attitudes: either to protect the maximum value of the States or to protect an irreducible minimum of states activities. The first attitude accepts forebearance and immunity as a normal concept and countenances exceptions in the rule only where the States go beyond those activities undertaken to promote the public welfare. The second attitude assumes taxation of the States to be a desirable federal power and grudgingly concedes only sufficient immunity to permit States activities within some irreducible minimum essential to survival. Perhaps these differences in approach explain some of the conflicting writings on the questions.

Our interpretation of the "traditional-usual" "governmental function" tests meets the paramount need of the people of the States that state government shall not be stagnated. Any other interpretation would place the States in a straitjacket and freeze their activities as of some point of time. Yet, as Mr. Justice BLACK said in his concurrence in the *Gerhardt* case:[1] "The genius of our government provides that within the sphere of constitu-

[1] 304 U. S. 405, 427 (1938).

tional action, the people—acting not through the courts but through their elected legislative representatives, have the power to determine as conditions demand, what services and functions the public welfare requires."

Some of the cases have suggested that we may have no more modern viewpoint than that of 1776 or 1789 in appraising the traditional or usual character of "governmental functions."[1] It cannot be that in this single field the clock is not only to be stopped but is to be turned back a century and a half. The question cannot be answered by saying that port and harbor development is a governmental activity[2] but that airport development is not. In other words, the answer is not in terms of the specific machinery, or even, if you will, in terms of the specific activity by which the State or the federal government seeks to achieve its governmental purposes. The founding fathers were men of broader vision. They intended that State governments would continue to exercise "traditional" and "usual" and "essential" governmental functions by continuing to serve the welfare of their people in any way within their constitutional power.

It was for this reason that the Court had no difficulty in the *Brush* case in classing as "governmental" an activity which the City of New York did not begin to exercise until 1831: "Governmental functions are not to be regarded as non-existent because they are held in abeyance or because they lie dormant for a time. If they be by their nature governmental, they are nonetheless so because use of them has had a recent beginning."

In 1941 only 5.1% of all government expenditures was for "general administrative, legislative and judicial" pur-

[1] *South Carolina* v. *United States*, 199 U. S. 437, 456 (1905); *Helvering* v. *Gerhardt*, 304 U. S. 405, 417 (1938).

[2] See *Commissioner* v. *Ten Eyck*, 76 F. (2d) 515 (1935).

poses.[1] These actual expenditures by American government, federal, state and local, show how far we have come in the evolution of our thinking about what government ought to do. We doubt if it ever was the general feeling that government should provide no more than a legislative, a judiciary and a chief executive. But if that concept of government was ever acceptable to Americans, it has long since vanished.

The Bureau of the Census classifies general-government expenditures into eighteen categories. In this listing, the combined "general administrative, legislative and judicial" expenditures of all American governments ranked eighth. It was exceeded by (1) Protection (military, police, fire, inspection), (2) Welfare (relief, public assistance and institutional), (3) Schools, (4) Transportation (highways and waterways), (5) Social insurance (old age and unemployment), (6) Interest and (7) Natural resources (agriculture, forests, reclamation, floods). These seven fields of government activity accounted for 82.6% of total expenditures. To complete the range of governmental activities in order of size of expenditures, we have: (8) General administrative, legislative and judicial, (9) Debt retirement, (10) Hospitals, (11) Sanitation, (12) Contributions to public service enterprises, (13) Pensions, (14) Miscellaneous, (15) Recreation, (16) Health, (17) Correction and (18) Libraries.

Even though public libraries were hardly known in 1789, the federal tax collector of 1945 would have a hard time convincing the American people today that libraries are outside the "usual" or "traditional" province of local government. Our evolving concept of that province has added many such new methods of fulfilling the original democratic "governmental function" of promoting the public welfare.

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[1] "Financing Federal, State, and Local Governments: 1941," *supra*, Table 16.

That primary function of government remains; only the methods of meeting the basic need change with changing *mores*.

A similar commentary may be made regarding the group of adjectival tests which are gauged to the preservation of some undefined measure of state government. The phrases in this category are "strictly governmental," "essential governmental" and "indispensable governmental" functions. Sometimes the theme is embroidered by speaking of functions "which the State can only do itself."[1] A number of such phrases appear in *Helvering v. Gerhardt*[2] which speaks of the functions of the States "essential to their continued existence," "essential to the maintenance of a State government" and functions "without which the State could not continue to exist as a governmental entity."

The first question must be whether the States are to be preserved as effective and independent instrumentalities of local government or whether they are to be preserved as merely historical vestiges. The question is whether they are to exercise their governmental powers in new ways to meet changing conditions or whether the requirement that they must continue to exist is satisfied if they remain only different colored patches on a map.

In one sense, no function is indispensable to the continued existence of some form of state government. Few, if any, of the most precious powers of American government have not, at one time or another in history, been regularly exercised by private persons and corporations. The collection of taxes has been spoken of as an essential governmental activity. Yet, farming of the taxes to private individuals was once a common practice.[3] War was

[1] *Flint v. Stone Tracy Co.*, 220 U. S. 107, 172 (1911).
[2] 304 U. S. 405 (1938).
[3] Encyclopedia Britannica, vol. 6, p. 904; vol. 9, p. 90.

commonly carried on between the city-states in Renaissance Italy by contracting with a condottiere who hired his soldiers from Switzerland or some of the German States.[1] Parcel post is a relatively new venture for the federal government[2] and one which it still shares with private express companies.

History shows that there is no governmental power which has not been delegated to private persons. Huge portions of this country were administered in colonial times by private corporations, chartered by the Crown but exercising every governmental power within the area under their control. The Massachusetts Bay Company was one of these. The Dutch West India Company settled and provided the law for what is now New York. Even individuals received such delegation of powers. Sir James Carteret was the proprietor of and sole law in a great portion of what is now New Jersey. William Penn was proprietor and lawmaker of the present Commonwealth of Pennsylvania. In Canada, the Hudson Bay Company was the law and the only law in a vast region. The entire Empire of India was governed by the British East India Company even within the last hundred years. The Dutch East India Company governed the East Indies.

It seems that, in a literal sense, there is no function which only the State can do itself. The test of "essentiality" in a literal sense being valueless, the question of what is a proper function of state government becomes a choice of what Mr. Justice BLACK called "individual philosophies."[3] And if that path is followed, the Court will continue to be faced with a procession of these cases in which

[1] *Id.*, vol. 6, p. 223.

[2] Unknown before 1879 when it was permitted for packages weighing less than four pounds. The present scope of the federal parcel post was established only in 1912. See Encyclopedia Britannica, vol. 18, p. 316.

[3] Concurring in *Helvering* v. *Gerhardt*, 304 U. S. 405, 426 (1938).

it will be called upon to decide political problems which it has been traditionally loathe to consider.

Yet there is an interpretation of the "essential" type of adjectival test which eliminates the difficulty. We do not see how it can be disputed that the most essential of a democratic state's possible functions is the promotion of the public welfare. In that sense and in that sense only it can quite properly be said that state immunity may be restricted to essential activities of state government. It can hardly be that the "essential" type of test was intended merely to preserve the machinery of state government—the mere skeleton of the legislature, executive and judiciary, on which at the present time only 5.1% of government revenues are expended.[1] In a democracy the machinery exists merely to provide for the welfare of the people. It follows that if a State, in order to promote the public welfare, determines to perform an activity directly rather than to regulate it, it is doing so in the exercise of that power to promote the general welfare which is the most indispensable and essentially governmental of all the powers necessary to its existence.

Of course in construing this type of test, as in the companion type which talks of "traditional" and "usual" "governmental functions," we must not be tied in any narrow sense to the conception of any past generation as to what is indispensable to effective state government. Government, whether federal or state, must meet the needs of the people as they appear at the present time, or they do not earn the right to survive. Again we point out that the reconciling factor is that in democratic governments of all times, the difference has been only on means but never on the broad principle of the state's power and duty to act in a way which the people feel is best adapted to the solu-

[1] "Financing Federal, State and Local Governments: 1941," *supra*, Table 16.

tion of their problems and the problem of their well-being. That was the view of 1789; it is the view today.

There is no problem in determining whether in fact the primary motive for the performance of the activity was to give a public service or to fill a public need. The presumption is that the State has acted for that purpose. The Court already has at hand an armory of methods to determine whether state regulatory legislation is reasonable when challenged under the due process clause of the Fourteenth Amendment. The record of public agitation for an activity, the debates in the state or local legislature, the reports of fact-finding commissions and of legislative committees and sub-committees and legislative declarations of emergency and necessity may all be considered.

2. Precedent and the True Test.

It remains for us to consider the objection that the line of demarcation between immune and taxable state activities, property and income which we advance may violate the precedents stemming from *South Carolina* v. *United States*, 199 U. S. 437 (1905). It might be sufficient to answer in Mr. Justice CARDOZO's language that the *mores* of 1905 are not those of today. The majority justices in that case considered the possibility of the acquisition and management of public utilities like gas and water. They were so distressed by the prospect that they were impelled to ask rhetorically: "Would the state, by taking into possession these public utilities lose its republican form of government?"[1]

Yet when the Court in *Brush* v. *Commissioner*, 300 U. S. 352 (1937), classified the operation of municipal water works as an "essential governmental function," it no longer seemed troubled by a fear that it was thereby destroying the republican form of state government. The federal

[1] 199 U. S. 437, 451 (1905).

government has both preceded and followed the way of municipalities in providing power without any strong feeling that the foundation of the republic was being undermined.

But aside from changing *mores* the question as to what is the effective precedent in this field is most puzzling. The actual holdings are few and quite evenly balanced. We have pronouncements that lending money to a private railway is governmental and immune[1] but that rehabilitation of a private railway is not.[2] We have decisions that the sale of alcoholic beverages is a taxable private business,[3] but that the sale of potable water is an immune public service.[4] And we have the view that charging admission to a college football game is a taxable activity.[5]

Much can be said for the argument that there is no sound distinction between providing a direct service to promote the public good and providing a service in order to make money, which in turn would be used in support of the public good; that in reason both should be immune. Particularly is this so in the light of the rule so recently put forward that federal immunity is co-extensive with federal constitutional powers. The application of this doctrine to the States would leave no state activity taxable on the basis of precedent alone.

The rule of federal immunity as we are taught by *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95, 102 (1941), is:

> "The federal government is one of delegated powers, and from that it necessarily follows that any

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[1] *United States* v. *Baltimore & Ohio Railroad Co.*, 17 Wall. 322 (1873).

[2] *Helvering* v. *Powers*, 293 U. S. 214 (1934).

[3] *South Carolina* v. *United States*, 199 U. S. 437 (1905); *Ohio* v. *Helvering*, 292 U. S. 360 (1934).

[4] *Brush* v. *Commissioner*, 300 U. S. 352 (1937).

[5] *Allen* v. *Regents*, 304 U. S. 439 (1938).

constitutional exercise of its delegated powers is governmental."

We have tried to complete the syllogism implied in this sentence. The key seems to be in some assumed difference, unexpressed, between delegated powers and reserved powers. Yet the mere fact of delegation is not a difference which has any relation to "governmentality." Perhaps the thought is that the federal government has not been delegated any powers except those appropriate to the exercise of such admittedly "governmental" powers as the regulation of interstate and foreign commerce, the power to make war and foreign treaties. If an activity of the federal government is constitutional at all, it is because it is an appropriate exercise of those governmental powers. Applying this logic to the States, we seem led to the conclusion that when a state activity is undertaken as an appropriate exercise of a state power to promote the public welfare, the activity is within the scope of the immunity.

In the federal cases the effort is not to determine whether there is something intrinsically "governmental" or "commercial" in the activity of mortgage loans[1] or in the operation of railroads and steamship lines.[2] The question is solely whether the activity is an appropriate exercise of some express delegated powers, like the regulation of interstate commerce, all of which are governmental in the federal sphere.

In the case of the States, it seems that a like inquiry is indicated. The power to take all steps consistent with the Federal Constitution to promote the general welfare and improve the health, safety and morals of its people is perhaps the highest governmental power and duty of the States. If a state activity is an appropriate exercise of

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[1] *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95 (1941).

[2] *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401 (1937).

that power, either by regulation or by actual operation; it seems that the lesson of the federal cases requires that the activity be considered immune even though surplus revenues may be incidentally produced.

Reason would be offended by a ruling that power generation by the Tennessee Valley Authority is an immune function of government while power generation by the Department of Water and Power of the City of Los Angeles is a taxable function of government if both are undertaken to provide a needed public service. Reason would not accept a ruling that the federal participation in the Colorado River Compact is an immune activity of government while the participation of the States which joined in the Compact is something else. The federal government has not gone beyond the powers granted by the founding fathers, but the means it has used in the activities it has undertaken to carry out those powers go far beyond the wildest possible dreams of the most imaginative men of 1789. The reconciliation seems to be in the purpose of the undertaking and not in the manner of its effectuation for both the States and the federal government.

If this analysis is not sound, then the statement in the *Bismarck Lumber Co.* case that the federal government's activities are governmental because they are delegated, is a complete *non sequitur.* It is equally proper to say that all state activities are immune because they are reserved in the Constitution.

Our analysis is consonant with more decisions than it offends. The scope of state immunity was first outlined in a dictum in *Veazie Bank* v. *Fenno,* 8 Wall. 533, 547 (1869). It was there stated to apply to "all necessary agencies for legitimate purposes of State government."

The first case actually involving the question of the "governmentality" of state functions was *United States* v. *Baltimore & Ohio R. R. Co.,* 17 Wall. 322 (1873). The

City of Baltimore had lent $5,000,000 to the Baltimore & Ohio Railroad in return for a mortgage on the railroad property, at a specified rate of interest, in order to encourage the building of the railroad with Baltimore as a terminus. The United States attempted to collect a tax on the interest paid on this mortgage to the City of Baltimore. The Court held that the tax was on the City's income and not on the railroad company. The United States Attorney General then argued that the transaction was not strictly governmental and therefore not within the immunity doctrine. He cited a provision in the 1866 Taxing Act which said: "Provided that it is the intent hereby to exempt from liability to taxation such state, county, town or other municipal corporation, in the exercise only of functions strictly belonging to them in their ordinary governmental and municipal capacity."

The Court did not waste time in comparing the transaction with the ordinary operations of investment banking. It pointed out that the action by the City was "with a view to its commercial prosperity," that it was "exercised for the benefit of the community, that is, in the course of its municipal business or duties," that it was "acting in its capacity of an agent of the state, delegated to exercise certain powers for the benefit of the municipality called the City of Baltimore." The Court decided that the transaction was "within the range of the municipal duties of the City" and that whether it should have been undertaken "was a question for the decision of the City • • • to be decided solely with reference to public and municipal interests • • • not a question to be here discussed."

Quite obviously we have here, in the initial state case on the question, a decision that a State's immunity is as broad as its powers to undertake an activity "in the public interest." *Cf.* 12 Ops. Atty. Gen. (U. S.) 277 (1867).

The question was not raised again until *South Carolina* v. *United States*, 199 U. S. 437 (1905). Much language in

the opinion is not consistent with the rule already established in the *Baltimore & Ohio* case, but portions of the opinion make it clear that the Court was not at all convinced that South Carolina had "gone into the liquor business" for the primary purpose of regulating the traffic to improve public health or welfare. The Court said (199 U. S. 437, 454):

> "The profits from the business in the year 1901, as appears from the findings of fact were over half a million dollars. Mingling the thought of profit with the necessity of regulation may induce the state to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue tax. If one state finds it thus profitable, other states may follow * * *."

Even the Court in *United States* v. *Baltimore & Ohio R. R. Co.* might have held the liquor dispensary system taxable if it had been convinced, as the Court in the *South Carolina* case apparently was, that the primary purpose of the activity was not the improvement of the public health or welfare. In this sense, the *South Carolina* case, like the Georgia football case of *Allen* v. *Regents*, 304 U. S. 489 (1938), is perfectly consistent with the line of demarcation which we advocate if there is to be any line, and which we have drawn from the *Baltimore & Ohio Railroad* case, from *Brush* v. *Commissioner*, 300 U. S. 352 (1937), and from *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21 (1939), and *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U. S. 95 (1941).

Ohio v. *Helvering*, 292 U. S. 360 (1934), was obviously a case where the Court considered itself bound by the *South Carolina* case. The Court did not have the advantage of a full argument of the issue on the merits. The decision was made on a motion by the State of Ohio for leave to file a bill of complaint invoking the original jurisdiction of this Court. The motion was denied on the ground that

the question was foreclosed on its merits. Perhaps, if the Court had consented to hear argument by the State of Ohio and the fuller briefing which would have occurred if jurisdiction had actually been taken, the State might have been able to convince the Court that its operation of the liquor dispensary system in Ohio in 1934 was primarily to promote the public welfare and not for the purpose of profit as the Court appears to have believed it was in the case of South Carolina in 1905.

The next decision on the nature of a "governmental function" was *Helvering* v. *Powers*, 293 U. S. 214 (1934). Frankly, the language in the case cannot be reconciled with the decision in *United States* v. *Baltimore & Ohio R. R. Co.* and the rule which we have derived from that and the later cases. The Court said that even if the State was permanently operating the Boston Street Railway for reasons which it considered in the best interests of the public, the activity would nevertheless be taxable. But the facts of the case were hardly such as to make the claim for immunity very appealing.

In the first place, the case involved a tax not on the State or a municipality or other agency, but on the salary of a so-called "public officer." As it subsequently developed in *Helvering* v. *Gerhardt*, 304 U. S. 405 (1938), and in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939), the Court was already at the point where the immunity of state or federal salaries seemed like an overextension of the immunity of either sovereign. In the second place, the so-called "public officer" in the *Powers* case was the trustee of a private corporation in receivership, whose salary was a charge on the private corporation's receipts. In the third place, the State was merely seeking to rehabilitate a private corporation. The State's status was closely akin to that of the federal government when, through the appointment of trustees by a bankruptcy court, it "assumes the operation" of a private business.

The last case in which this Court classified a state activity which was undertaken to promote the public health and welfare was *Brush* v. *Commissioner*, 300 U. S. 352 (1937). And in that case there was a complete return to the original principles of *United States* v. *Baltimore & Ohio R. R. Co.* and a tacit if not actual reversal of the dicta in *South Carolina* v. *United States*, 199 U. S. 437 (1905), and *Helvering* v. *Powers*, 293 U. S. 214 (1934). In the *Brush* case this Court held that the operation of a municipal waterworks is "an essential governmental function" and immune from federal taxation. None of the Justices disagreed with the holding that the activity was an "essential governmental function." Justices STONE and CARDOZO concurred on the ground that the applicable Treasury regulation provided for exemption to public employees engaged in the exercise of an "essential governmental function." Although they were not convinced that the Constitution required the immunity of Mr. Brush's salary, they accepted the decision that the activity in question was an "essential governmental function" within the meaning of the regulation.

The opinion showed that the City had taken over the activity in 1831 because it had become dissatisfied with the private control. The history of the government operation was shown to have resulted from the "public interest." Stress was placed on "the governmental power to deal with water" and that the service was necessary for "the health and comfort of the City's population." It was clearly inconsistent with the *South Carolina* case since the *South Carolina* case pointed to municipal water service as a public utility activity which was not a governmental function,[1] and the *Brush* case held to the contrary. The *South Carolina* case drew support from the analogy of the "governmental versus proprietary" distinction in the field of

[1] 199 U. S. 437, 454 (1905).

municipal tort liability;[1] the *Brush* case rejected the analogy outright.[2]

The *Brush* case gave many citations to show that water had generally been a matter of public concern. But the nub of the case is contained in the following principle (300 U. S. 353, 371):

> "It may be, as it is suggested, that private corporations would be able and willing to undertake to provide a supply of water for all purposes; but if the State and City of New York be of opinion, as they evidently are, that the service should not be entrusted to private hands but should be rendered by the City itself as an appropriate means of discharging its duty to protect the health, safety and lives of its inhabitants, we do not doubt that it may do so in the exercise of its essential governmental functions."

Here we have the true rule, the minimum rule of immunity to which the States subscribe. It is a holding, not

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[1] 199 U. S. 437, 461 (1905).

[2] 300 U. S. 352, 363 (1937). The following articles criticize the distinction between "proprietary" and "governmental" functions even in the tort field from which it was imported into the field of intergovernmental immunity: "Distinction between Government and Proprietary Functions of Municipal Corporations," Delmar W. Dobbridge, 23 Mich. Law Review, 325 (1925); "The Extension of Municipal Liability in Tort," Charles W. Tooke, 19 Va. Law Review, 97 (1932); "State and Municipal Liability in Tort—Proposed Statutory Reform," Edwin M. Borchard, 20 Amer. Bar Assn. Journal, 747 (1934); "Tort Liability of Municipal Corporations in Indiana," Alma Chattin, 10 Ind. Law Journal 329 (1935); "Government Liability in Tort," Edwin M. Borchard, 34 Yale Law Journal 1, 129, 229; 35 Yale Law Journal 1, 757, 1039; 28 Columbia Law Review 734 (1924); "The Foundations of the Distinction Between Public and Private Functions in Respect to the Common Law Tort Liability of Municipal Corporations," James D. Barrett, 16 Oregon Law Review 250 (1937); "Municipal Tort Liability in Operation," Edgar Fuller and A. James Casner, 54 Harvard Law Review 437 (1941); "Governmental Responsibility for Torts in Minnesota," Orville C. Peterson, 26 Minnesota Law Review, 293, 480, 613, 700, 854 (1942); Thurston, "Government Proprietary Corporations" (1942), preface page 2.

a dictum. It is the answer to the argument that precedent requires that the State's immunity need be any narrower than the State's power to adopt any appropriate means of effectuating its power and duty of promoting the general welfare of its people, protecting their lives and morals and preserving their health and safety.

If the Court feels compelled by precedent to distinguish between different types of state activities, there seems no possible alternative to the test we have suggested. It is democratic because it leaves to the people of the States the decisions as to the scope of the States' activities, and saves the Court from deciding the political question of the propriety of state activities. It is an expedient rule—it should end the plaguing recurrence of case after case to decide on "traditional" or "essential" character. It is fair as between States and the federal government because it applies the same test for immunity in both cases. It avoids stagnancy in state government by permitting the people of the States to decide with changes in times and conditions what changed approach they will have to their problems. It involves no affront to sovereignty because it forbids federal taxation of the States in all cases where they act, as sovereigns, to promote the public good. It preserves the place of the States in the federal system since it prevents federal control and regulation by selective or conditioned exemption designed to substitute the policy of the federal government for the policy of the local governments in purely local spheres. It protects the fiscal balance between the States and the federal government by preventing a huge new burden of taxation of the States. It avoids curtailing local governmental services because of the new tax burden. It leaves intact the state policy of using the system of paying for the cost of some services by charges on the users rather than on the general taxpayers. It avoids widespread municipal bankruptcy which would be caused by taxes on state and municipal revenues

which have already been pledged or ear-marked for the retirement of revenue or general obligations. It fits the precedents more closely than any other test.

In the light of the now proven and theretofore undreamed of capacity of the federal government to expand its revenues without any embarrassment from state activities, the rule which we have proposed could not possibly threaten any impairment of the federal taxing powers. On the contrary, the public work of the States and Cities and their contribution to the welfare and prosperity of the American people vastly increases the revenue potential of the federal government.

In short, "We have a principle which is safe for the states, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve."[1]

POINT IV

The extent to which a State may withdraw property or income or activities from the reach of federal taxation by enlarging its property ownership or its activities.

Point I of this brief is responsive to the Court's first question. As indicated, that question admits only a negative answer.

The answer to the Court's second question is implicit in Points II and III, which have been devoted primarily

[1] *M'Culloch* v. *Maryland*, 4 Wheat. 316, 403 (1819).

to intergovernmental taxation and immunity. In Point II we concluded that intergovernmental taxation is constitutional only if actually necessary to preserve the existence of the taxing government, and that such necessity does not in fact exist. Although this appears to be the soundest rule, nevertheless some line of division between types of state activities has been suggested in prior decisions of this Court. The Court has spoken of the difference between "governmental" functions, and "business" or "commercial" activities of a State. It has qualified the phrase "governmental function" with adjectives such as "usual," "traditional," "essential" and "indispensable." If for some reason it is felt necessary to discriminate between types of state activities, the true purpose of these qualifications supplies the minimum possible answer to the Court's second question:—A state may enlarge its property ownership and activities without becoming subject to the Congressional taxing power at least so long as it is rendering a service which its people believe "should be rendered by the city (or State) itself as an appropriate means of discharging its duty to protect the health, safety and lives of its inhabitants." See *Brush* v. *Commissioner*, 300 U. S. 352, 371 (1937) and cases therein cited.

Conclusion

In submitting this brief, we, the National Association of Attorneys General, and the individual Attorneys General whose names are subscribed hereto, sincerely trust that we are in truth acting as friends of this Court. It is our firm conviction that the problem of intergovernmental taxation and immunity is one of pressing importance directly affecting the maintenance of sound relationships between the state and federal governments. We would fail in our duty as public officers, as members of the Bar and as citizens, if we did not seek to aid in its solution.

The rules which we urge and the principles which we advocate represent our collective judgment as to what constitutes sound constitutional law and sound public policy. While as state officers we have emphasized the place of the States in our federal system, we do not urge our views upon the Court in any narrow spirit of partisan advocacy. We do so in a sincere belief that they are in the best interests, not only of the States and the Nation, but also of our citizens to promote whose welfare both the States and the Nation exist.

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